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042
No. 15,523

United States Court of Appeals
For the Ninth Circuit

DANIEL L. ABDUL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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FILED

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No. 15,523

**United States Court of Appeals
For the Ninth Circuit**

DANIEL L. ABDUL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the District of Hawaii.**

APPELLANT'S REPLY BRIEF.

This brief is written in reply to Appellee's Answering Brief, a printed copy of which was received through the mail on November 27, 1957. Appellant will not reply herein to the argument of Appellee on each and every specification of error, but this is not to be construed as a waiver of any specification on which no further argument is offered.

REPLY TO APPELLEE'S STATEMENT OF THE CASE.

Appellee complains that Appellant has designated portions of the record which will place him "in the

most favorable light in this Court'', and that this placed Appellee ''in somewhat of a dilemma'' as to what Appellant's purpose was and as to what additional portions should be designated (Appellee's Brief, 3). It is regrettable that Appellee was confronted with such a momentous problem, for it had been assumed that the purpose was obvious. Portions of the record which were felt to reflect the Appellant's *bona fides* were designated so there could be no question that a substantial issue on this point had been raised in the evidence. Were this not the case there would have been no basis for the instructions requested by Appellant on the subject of ''wilfulness'' nor for his objections to the instructions given defining that term as used in the misdemeanor counts of the indictment. *United States v. Phillips*, 7th Cir., 1954, 217 F. 2d 435, 442.

Appellee further complains that after it had filed a counter-designation, designed to show that ''the returns were filed under duress and the taxes were collected by distraint after a great deal of effort'', Appellant filed a further designation. Appellee expresses the fear that the process of designating portions of the record could go on ''*ad infinitum*'' (Appellee's Brief, 4). It is submitted that speculation of this sort should not be made a part of an appellate brief. There were no further designations, and the process could not be continued indefinitely as it is necessarily limited by the bounds of the record. The additional designation was made by Appellant to show that evidence bearing on the issue of Appellant's good faith was

also adduced through the only witness whose testimony had been designated in part by the Appellee.

Appellee argues that Appellant “makes no point of the sufficiency of the evidence” (Appellant’s Brief, 3) and then, paradoxically, presents its statement of the case which it says supports its conclusion that Appellant is “an extremely dishonest and unscrupulous man” (Appellee’s Brief, 5-8, 4).

Appellee posits this characterization of Appellant in part on its Requested Instruction No. 8 (R. 22-23) which it states “was refused solely on the ground that the Court declined to comment on the evidence” (Appellee’s Brief, 5). In fact, the Court ruled on this point as follows:

“I will not give Instruction Number 8 at all. I have not made it a practice in the past to comment on the evidence and may not in the future, *but if I am going to comment on the evidence, I am going to do it by way of summarizing both sides and not concentrating on one side or the other. I want to be fair.*” (R. 240-241. Emphasis added.)

This language indicates that the court recognized an issue of *bona fides* had been raised by the evidence.

It is to be noted that in that portion of its statement of the case appearing on pages 5 and 6 of its Brief Appellee has not referred to any pages of the record in support of the statements made. There are two statements which are clearly inaccurate. It is said that his bookkeeper advised him “that he could file the returns without payment although a penalty would

ensue, . . . ” The entire testimony of the bookkeeper was printed (R. 54-173). Nowhere does it appear that the bookkeeper warned Appellant that “a penalty would ensue”. It is further said that the taxes in each instance were eventually collected “through distraint”. What eventually happened was that Appellant had to close his business through an auction to raise sufficient money to pay the balance of the taxes due, and that although a levy was prepared (Exhibit A) an agreement was entered into with Appellant whereby he paid over 80% of the monies collected at the auction to the Internal Revenue Service (R. 180, 185-186). The evidence establishes beyond any doubt that Appellant had made substantial payments in the amount of \$8,802.88 on withholding and F.I.C.A. tax liabilities for the period from October 1, 1953, through June 30, 1955, before the auction was held. The total amount due for this period was \$17,489.93 (Exhibit 21).

Appellant is unable to understand how Appellee computed that \$82,784.00 accrued to the benefit of his wife and himself during the six quarters covered by the indictment (Appellee’s Brief, 7). It is true that his individual income tax returns reflect that he and his wife earned \$2400.00 per month from the business which would make a total of \$43,200.00 for the six quarters involved, but it is also true that these checks were frequently not cashed due to shortage of funds (R. 131). In addition, his borrowings from the company approximated \$1900.00 during the year 1954 (Exhibit 28). Not having Exhibit H or 28 at this

time, Appellant is unable to determine his net borrowings from the company, if any, during the last quarter of 1953 and the first two quarters of 1955.

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

THE COURT ERRED IN INSTRUCTING THE JURY AS IT DID ON THE MEANING OF "WILFUL".

It is to be noted that, though Appellee has quoted the Supreme Court's general definition in *United States v. Murdock*, 1933, 290 U.S. 389, 394, of "wilfully" when used in a criminal statute, Appellee has chosen to ignore the balance of the definition given by the Supreme Court in that case to the effect that the term "wilfully" makes "evil motive a constituent element of the crime" when the crime charged is, as in the instant case, a misdemeanor violation of the taxing statutes. Appellee then leaps to *Spies v. United States*, 1943, 317 U.S. 492, 497, 498, which involved a violation (felony) of Section 145(b) of the Internal Revenue Code of 1939, and quoted a portion of some *obiter dictum* given by the Court on the subject of what "wilfully" means. Once again the *full* comment of the Court on the subject must result in a different conclusion from that drawn by Appellee.

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. *Both must be willful*, and willful as we have said, is a word of many meanings, its construction often

being influenced by its context. *United States v. Murdock*, 290 U.S. 389. It *may* well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. More voluntary and purposeful, as distinguished from accidental omission to make a timely return *might* meet the test of willfulness. *But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."* (Emphasis added.)

Appellee can gain small comfort from the definition given by the Court in *Kellems v. United States*, D. C. Conn. 1951, 97 F. Supp. 681, 682, of the term "wilful" as used in the civil penalty statute. It is submitted that the answer to this authority cited by Appellee is the case of *Paddock v. Siemoneit*, Tex., 1953, 218 S.W. 2d 428, 7 A.L.R. 2d 1062, 1071, wherein the Court distinguished between the meanings of the term "wilfulness" as used in tax statutes imposing criminal penalties and tax statutes imposing civil penalties.

The vice of the District Court's Instructions on the subject of "wilfulness" as pointed out in Appellant's Opening Brief lay in its drawing a sharp and repeated distinction between the meaning of the term as used in the felony counts and as used in the misdemeanor

counts, and in requiring "bad purpose" only as an *alternative* element of "wilfulness". The instructions do not meet the requirements of the *Murdock* case which makes "bad faith or evil intent" an essential element of the offense.

It is submitted that the portions of the record which have been printed show that an issue as to the *bona fides* of Appellant had been raised which should have been submitted to the Jury by appropriate instructions. *United States v. Phillips*, *supra*; *United States v. Raub*, 7th Cir. 1949, 177 F. 2d 312, 316; *Tatum v. United States*, U.S. App. D.C. 1950, 190 F. 2d 612, 617. In the *Tatum* case the Court held:

" . . . in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own."

The good faith defense of the Appellant to the charge that he wilfully committed the offenses charged is based on evidence (1) that the company lacked funds with which to pay the taxes when due (R. 80, 84, 111); (2) that he thought and was advised by his accountant that the taxes must be paid together with the return (R. 132-133); (3) that his books which were available to Internal Revenue Service agents, always accurately reflected his tax liability (R. 121-122, 166); and (4) that he always intended to pay the taxes, and did (Exhibit 21) when he was able to raise

sufficient funds (R. 196-197). Appellant did not tell the truth when he advised the Internal Revenue Service collectors who were hounding him for payment that he had sent in the returns, but this presents no paradox as far as the issue of good faith is concerned; he was simply trying to gain time to raise money to pay the taxes which were due (R. 196-197). It must be remembered that his company was in such dire financial straits that even though he kept close tab on the bank balance payroll checks occasionally bounced (R. 171).

Appellant has never contended that the taxes due did not constitute a debt to the Government, nor has he contended that the lack of money with which to pay the taxes was a "legal excuse" for failing to file the return on time. It is his contention that the evidence outlined above was evidence of good faith as distinguished from bad faith or evil intent which the Court held in the *Murdock* case is an essential element of the offense. It is further his contention that this issue was never presented to the jury because of the District Court's failure to instruct that bad faith or evil intent must be established beyond a reasonable doubt to return a verdict of guilty on the misdemeanor counts.

Appellant accepts the proposition stated in *Forster v. United States*, 237 F. 2d 617, 621, that "instructions on wilfulness need not be stated in seven different ways, each an invitation to acquit", provided that each instruction given on the subject is a correct statement of the law and with reference to the subject of wilfulness requires a finding of bad faith or

evil intent. This finding was not required by the Court's instructions on the misdemeanor counts; the matter was brought to the Court's attention through the instructions requested by Appellant and arguments presented at the time the instructions were settled. Even if no instructions on the matter, or instructions which were not entirely correct statements of the law, had been requested by Appellant it was the Court's duty to give a correct instruction defining the term "wilfully" as used in the misdemeanor counts. *Carrado v. United States*, U.S.C.A. D.C. 1953, 210 F. 2d 712, 722, cert. den. 347 U.S. 1018; *Marson v. United States*, 6th Cir. 1953, 203 F. 2d 904, 912; *McQuaid v. United States*, U.S.C.A. D.C. 1951, 193 F. 2d 696, 697, cert. den. 344 U.S. 929; *Morris v. United States*, 156 F. 2d 525, 169 A.L.R. 305; *Colbert v. United States*, U.S.C.A. D.C. 1944, 146 F. 2d 10; *Williams v. United States*, U.S.C.A. D.C. 1942, 131 F. 2d 21, 23.

In the *Marson* case it is stated at p. 912 as follows:

"With respect to a charge on the theory relied upon, it is the law that where a defendant in a criminal case presents a theory supported by the evidence and the court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such a theory."

and in the *Colbert* case at page 12:

"... where the judge elects to charge in his own language on all matters properly to be considered by the jury, the failure of a requested instruction to conform precisely to the law, should not relieve the court of the duty to charge accurately upon an important phase of the evidence."

SPECIFICATION OF ERROR NO. II.

THE COURT ERRED IN GIVING GOVERNMENT'S REQUESTED INSTRUCTION NUMBER 22 TO THE JURY.

Appellant objected to Government's Requested Instruction No. 22 on the ground that it was "more in the nature of comments and conclusions" rather than an instruction on the law (R. 252). Perhaps the objection could have been more artfully phrased, but it should have been sufficient to give fair warning that the proffered instruction was not of the type customarily given. In any event, as an erroneous charge prejudicial to the Appellant this Court may review it. *Block v. United States*, 9th Cir. 1955, 221 F. 2d 786, 788.

An examination of the record reflects that Instruction No. 22 was not so comfortably cushioned or lost between instructions to acquit as Appellee suggests. It is immediately preceded by an instruction that prior investigations to determine civil tax liability are no bar to criminal prosecution, and that instruction is preceded by one that it is not incumbent upon the Government to prove the defendant guilty beyond all possibility of doubt (R. 278). It is followed by a lengthy instruction on the subject of evidence of good and bad character (R. 278-280). In fact, this instruction was particularly prejudicial because of its position in the order of instructions.

The case of *United States v. Link*, 3d Cir. 1952, 202 F. 2d 592, is good authority for Appellant's contention that Instruction No. 22 as given is reversible error. The closing lines of the instruction complained

of in that case, to-wit: "The people of the United States are entitled to be assured of conviction.", are but a short step removed from the last portion of Instruction No. 22 that " . . . unless you do your duty you might just as well strike the laws off the statute books." This suggestion of the Court rings with warnings of anarchy and is a call to convict.

The words of caution contained in *Starr v. United States*, 1894, 153 U. S. 614 at 626 are in point:

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

SPECIFICATION OF ERROR NO. III.

THE COURT ERRED IN REFUSING TO STRIKE THE WITNESS WALKER'S TESTIMONY.

"It is fundamental that evidence to be admissible must relate and be confined to the matter or matters in issue in the case at bar and must tend to prove or disprove these matters or be pertinent thereto, or, to put it another way, proof must correspond to the issues raised by the pleadings."

20 Am. Jur. 242, § 248.

The authorities cited by Appellee on this specification do not provide an answer. *Peoples Loan & Investment Co. v. Travelers Ins. Co.*, 8th Cir. 1945, 151 F. 2d 437, was an action to recover on a double indemnity provision for accidental death of insured—he was

shot—in an encounter with a police officer. Evidence was admitted of insured's prior expressions of hostility to police officers and of prior incidents he had had with them. Here the Court found that insured's expressions of direct animosity against the police was admissible under a special Arkansas rule on the subject of proof of self-defense, and that they were neither too remote nor prejudicial. The Court pointed out that there is no error "where the evidence is not such as is clearly apt to confuse a jury's mind or prejudice its judgment."

In *Gordon v. United States*, 6th Cir. 1947, 164 F. 2d 855, a conspiracy charge, evidence was admitted of defendant's complicity in other crimes which related closely on the history of the conspiracy. The Court held its admission was proper stating " . . . it tended to throw light upon facts and conduct in issue." *Clune v. United States*, 1895, 159 U.S. 590, relates to a conspiracy to obstruct the mails. Certain cables (one from Eugene V. Debs) concerning the stopping of trains were received in evidence. The Supreme Court found that these cables tended to show the existence of the conspiracy.

How different is the instant case? Assuming the truth of the statement attributed to Appellant by the witness Walker, it does not reflect anything more than an intention to get a "dead beat" to pay his obligations probably so that Appellant would have some money to pay the taxes which were due from his company. If Walker had said he was heavily indebted to a bank, Appellant would undoubtedly have made the same reply using the name of the bank instead of "Uncle

Sammy'', but the irrelevance of and the prejudice in the statement attributed to him is readily apparent.

CONCLUSION.

It is again respectfully urged that the judgment appealed from herein should be reversed.

Dated, Honolulu, T. H.,
December 12, 1957.

HOWARD K. HODDICK,
Attorney for Appellant.

No. 15,523

United States Court of Appeals
For the Ninth Circuit

DANIEL L. ABDUL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii in
Cr. No. 11,072.

BRIEF FOR APPELLEE.

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No. 15,523

United States Court of Appeals For the Ninth Circuit

DANIEL L. ABDUL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii in
Cr. No. 11,072.

BRIEF FOR APPELLEE.

JURISDICTION.

The District Court had jurisdiction at the trial of this case under 18 U.S.C. § 3231, and Rule 18, Federal Rules of Criminal Procedure. After conviction on six out of twelve counts of the Indictment, a timely appeal was taken by the Defendant and the jurisdiction of this Court to review the judgment of the District Court is invoked under 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE.

An Indictment containing twelve counts was returned against Appellant in the United States Dis-

trict Court for the District of Hawaii on August 16, 1956 under §§ 2707(b) and (c) of the Internal Revenue Code of 1939, and §§ 7202 and 7203 of the Internal Revenue Code of 1954 charging him, as President and General Manager of Home Furniture Co., Ltd., a Honolulu corporation employing labor, with willfully, and knowingly failing to make to the District Director of Internal Revenue at Honolulu, Employer's Quarterly Federal Tax Returns of Wages Withheld from his employees for the payment of Federal Income Taxes and Federal Insurance Contribution Act Taxes, and with willfully failing to truthfully account for and pay over said taxes to the District Director on the dates and for the amounts as follows (R. 3-15):

| | | |
|---------------------|---------------|------------|
| Counts I and II | Jan. 31, 1954 | \$2,987.58 |
| Counts III and IV | Apr. 30, 1954 | 2,095.81 |
| Counts V and VI | July 31, 1954 | 1,794.36 |
| Counts VII and VIII | Oct. 31, 1954 | 1,796.85 |
| Counts IX and X | Apr. 30, 1955 | 1,601.69 |
| Counts XI and XII | July 31, 1955 | 1,380.87 |

Appellant pleaded not guilty to each count of the Indictment on September 21, 1956 (R. 298). The case was tried by jury before the Honorable Jon Wiig, U.S. District Judge, on November 26 through 30, and December 3 through 5, 1956 (R. 298-302). On December 5, 1956 the jury returned a verdict of guilty as to each of the odd numbered counts and not guilty as to each of the even numbered counts (R. 295, 302). The usual motions were made by the Defendant, first after the termination of the Plaintiff's case, then

after all the evidence was in, and subsequently following the verdict. Each was denied in turn (R. 300, 301, 302), and judgment was rendered against the Defendant on January 11, 1957 (R. 303). Notice of appeal was filed on January 14, 1957 (R. 303).

Although Appellant makes no point of the sufficiency of the evidence in his appeal to this Court, he has gone to great lengths in his statement of the case to set forth the "facts" relating to the general issue which would place him in the most favorable light in this Court and has designated piecemeal certain portions of the record apparently for this purpose.

When served with Appellant's Statement of Points to be Relied Upon on Appeal, and Designation of Record on Appeal to be Printed, Appellee was placed in somewhat of a dilemma in determining just exactly what the purpose was in designating those certain portions aforesaid and in turn what additional portions of the record it was necessary to designate. Unless some good purpose appeared therefor a counter-designation of the whole record would have been excessive and would have resulted in a very expensive printing bill. For this reason Appellee singled out a few portions of the record which countered to some degree those portions designated by Appellant relating to the merits of the case and filed its Counter-Designation in this Court on April 22, 1957.

It was anticipated that Appellant intended to represent to this Court that the tax returns involved in this case were filed and the taxes ultimately paid vol-

untarily by him. This supposition is borne out in Appellant's Opening Brief, pages 5 through 7. Consequently, Appellee designated as Item No. 6 of its additional portions of the record material to consideration on appeal certain testimony of George D. Stratton (R. 179, 180), in order to demonstrate to the contrary, i.e., that the record showed the returns were filed under duress and the taxes were collected by distraint after a great deal of effort on the part of the Internal Revenue Agents. A review of all of the testimony would be necessary to obtain the true picture.

Appellant, not to be outdone, filed a third Designation herein on or about April 24, 1957 calling for additional testimony of George D. Stratton to be printed (R. 181-186). This third Designation which was filed by Appellant was not in compliance with any of the rules of this Court, specifically, Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit. If this practice were allowed to continue, presumably the parties could designate and counter-designate ad infinitum.

Upon a review of the whole record Appellee contends that a statement of the case could be drawn fairly describing the Appellant as an extremely dishonest and unscrupulous man in the operation of his business, and in particular in his relations with the Internal Revenue Agents. Suffice it to say, Plaintiff's Requested Instruction No. 8 (R. 22, 23) contains a very brief but adequate summary of some of the evidence contained in the whole record to this effect.

Most of the comment contained therein is substantiated by the limited portions of the record which have been printed herein, specifically pages 66, 72, 73, 76, 92, 93, 196, 145, 146, 160, 68, 69, 179, 180, 98-101, 147, 148, 58, 97, 84, 85, 169, 171-173, 211, 213, and Plaintiff's Exhibits numbered 3, 8, 18, 19, 22 and 23, and Defendant's Exhibit "H". The aforesaid Instruction was offered in good faith and was refused solely on the ground that the Court declined to comment on the evidence (R. 240, 241), even though this type of instruction has been given consistently in tax cases, on the authority of *Spies v. U. S.*, 317 U.S. 492. See *Forster v. U. S.*, 9 Cir. 1956, 237 F. (2d) 617, 619-20.

With the foregoing preliminary comment we will state briefly the case:

Appellant, during the period covered by the Indictment, was President and General Manager of Home Furniture Co., Ltd. a Honolulu corporation. He operated the business more like a sole proprietorship.

In connection with the delinquencies involved herein, timely tax returns and checks in payment thereof were prepared by Appellant's bookkeeper and placed on his desk for signature and mailing to the District Director of Internal Revenue. In each case the Appellant declined to mail the return and remittance, ostensibly because he did not have sufficient cash on hand to satisfy all of the Company's current obligations and elected to satisfy others rather than pay the taxes. He was advised by his bookkeeper that he could file the returns without payment al-

though a penalty would ensue, however, for his own reasons he elected not to do so. There is ample evidence from which it could be concluded that he did not file the returns without payment in order to keep from the Internal Revenue Agents the information from which they could assess the tax and collect it by distraint.

Soon after the first delinquency the Internal Revenue Agents began their extensive inquiries, both in person and by telephone, which continued over the better part of two years. Appellant represented to the Agents that the returns had been filed, or had been mailed, and if they hadn't been received they must have been lost, or at least he didn't know what had happened to them. When such representations were made Appellant well knew that the returns which had been prepared, were and continued to remain in a folder on Appellant's desk. Through such misrepresentations, and others, the Appellant was able to sidestep the Revenue Agents and avoid the collection of his taxes for as long as two years. In each instance duplicate returns were ultimately made upon the insistence of the Internal Revenue Agents so that the taxes could be assessed and the money collected, which was eventually accomplished through distraint.

Although the Appellant represented inability to pay as his excuse for failing to file and pay, the Company bank accounts showed that during the period covered by the six quarters involved, when a total of \$11,657.16 in withholding taxes was required

to be held in trust under the law, receipts of the Company in the amount of \$379,278.02 were disbursed by it for other obligations (R. 84, 85, 169, 171-173, 211, 213, and Plaintiff's Exhibits 22 and 23). And during this very same period, out of these amounts, approximately \$82,784 accrued to the benefit of the Appellant individually through loans and withdrawals, and salaries to himself and to his wife (R. 98-101, 147, 148, 58, 97, Plaintiff's Exhibits 15-19, 28, and Defendant's Exhibit "H").

During the course of the trial, as part of the Plaintiff-Appellee's case, one James Walker was called to testify to a conversation held with the Defendant on February 1, 1955, during the period encompassed by the Indictment, reflecting the attitude of the Defendant toward taxes due to the United States (R. 174-176). Appellant moved to strike this testimony, which motion was denied, and then moved for a mistrial, which motion was also denied (R. 177, 178). Appellant assigns as error the denial of these motions as well as the refusal of the Court to give Appellant's proposed Instruction No. 48 (R. 20) relative to this testimony.

Subsequently the Defendant took the stand and on cross-examination was questioned in detail with respect to his business practices during the period covered by the Indictment for the purpose of impeachment and to test his credibility and to demonstrate his unscrupulousness in carrying on his business as it might reflect upon his intent in failing to file the Company's tax returns and pay its taxes (R. 198-

210). Appellant assigns the allowance of these questions as error.

At the termination of the evidence Plaintiff submitted twenty-two proposed instructions and the Defense submitted fifty-four (R. 301). The settling of the Instructions resulted in a great deal of debate between counsel (R. 214-261). The majority of this centered around the definitions of the word "willfully" as contained in the statutes and in the Indictment, and the distinction, if any, between the definition of the word as applied to the odd counts or the misdemeanor counts and the even counts or the felony counts under the two different statutory sections in light of the decisions in *U. S. v. Murdock*, 290 U.S. 389; *Spies v. U. S.*, *supra*, and others. Although involved herein were different felony sections of the statute which have never been construed by the Supreme Court, the Plaintiff-Appellee, out of an abundance of caution and in view of the *Spies* case, submitted its proposed Instruction No. 7 (R. 20, 21) which incorporated the more stringent definition of the word "willfully" with respect to the felony counts contained in the Indictment (R. 20-22). The Court adopted the distinction and accepted the proposed definition as applicable with respect to the misdemeanor counts. Appellant assigns as error the giving of the less stringent instruction on the definition of "willfully" with relation to the misdemeanor counts upon which he was convicted. The significance of this issue is pointed up by the fact that the jury acquitted him on the felony counts.

Appellant also assigns as error the giving of Plaintiff's Requested Instruction No. 22 (R. 25), a general admonition to the jury.

Although there are numerous other assignments of error contained in Appellant's Statement of Points to be Relied Upon on Appeal (R. 308-310), since they have not been treated in Appellant's Opening Brief it is assumed that they have been abandoned.

ARGUMENT.

SUMMARY.

1. (a) The instruction as given herein and as quoted below with respect to the misdemeanor counts in the Indictment of which the Appellant was convicted, taken together with all the other instructions, was a correct statement of the law and properly submitted to the jury in the abstract the question of the wilfullness of the Appellant in failing to file the required tax returns:

“The word ‘wilful,’ as used in Counts I, III, V, VII, IX, and XI, that is, in failing to make a tax return, means with a bad purpose or without ground for believing that one's act is lawful, or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act.”

(b) Appellant's requested instructions numbered 37, 38, 40, 41, 42, 45 and 46, the refusal to give which he complains of as error, were unnecessary in view of

the instructions given and inappropriate because unsound in law.

2. The giving of Plaintiff's Requested Instruction No. 22 taken with all the other instructions did not erroneously appeal to the jury to convict the Appellant and is not shown to have affected the substantial rights of the Appellant. Moreover, the giving of the instruction was not validly objected to at the trial on the grounds now stated.

3. The testimony of James Walker relative to the admissions of the Defendant was relevant and directly material to the principle issue of intent and willfulness and was properly offered by the Government for this purpose.

4. The questions asked the Defendant on cross-examination which were answered over objection were appropriate for the purpose of impeachment and to demonstrate his methods of carrying on his business as they might reflect on his intent and willfulness in failing to file the Company's tax returns and pay its taxes, and the jury was properly instructed in this regard.

I.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF THE TERM "WILLFULLY" AS USED IN THE ODD OR MISDEMEANOR COUNTS OF THE INDICTMENT ON WHICH THE APPELLANT WAS CONVICTED.

In addition to the standard form of instructions relative to intent, state of mind, and motive, etc., the Court gave the following instructions pertinent to the

question of willfulness in relation to the odd or misdemeanor Counts:

“An Act is done or omitted knowingly if done or omitted voluntarily and purposely and not because of mistake or inadvertence or other innocent reason. An act is done wilfully if done voluntarily and purposely and with specific intent to do that which the law forbids. An omission to act is done wilfully if done voluntarily and purposely and with the specific intent to fail to do that which the law requires to be done. A person who knowingly does an act which the law forbids or who knowingly fails to do an act which the law requires, purposely intending to violate the law, acts with specific intent.” (R. 268).

* * * * *

“Now, as to the other counts of the indictment, one, three, five, seven, eight (sic.) and eleven, generally speaking, what I have just read to you is applicable with this limitation on the definition of the word ‘wilful’ in failing to make a tax return. In that connection it means with a bad purpose or without grounds for believing that one’s act is lawful or without reasonable cause or capriciously or with a careless disregard of whether one has a right so to act.” (R. 269).

* * * * *

“You are instructed that if from the evidence you find that the defendant did not file tax returns at the time or times required by law (or that he did not pay the tax required by law), such failures in themselves do not constitute willfulness under the law, unless you find that the filing (and paying) late of such taxes were acts with a bad purpose or an evil motive. If the

Government's proof goes no further than to establish a state of facts for (sic.) which the inference of untruthfulness or wilfulness may not (sic.) be reasonably drawn, then the Government has failed to establish the charges beyond a reasonable doubt, and under such circumstance it would be the duty of the jury to acquit the defendant." (R. 274). [Appellant's proposed Instruction No. 35].

Following objections made by Appellant's counsel, the Court gave the following additional instructions:

" . . .

" . . . The word 'wilful' as used in counts 1, 3, 5, 7, 9, and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act. With regard to the other counts, 2, 4, 6, 8, 10 and 12, I supplement my instructions on the definition of wilful in the following language: An act is done wilfully if done voluntarily and purposely and with a specific intent to do that which the law forbids. Wilfulness implies a bad faith and an evil motive." (R. 287, 288).

After deliberating for a while the jury inquired further as to the meaning of "willfully" and the Court gave the following instruction:

"The word 'wilful' as used in counts 1, 3, 5, 7, 9 and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without

reasonable cause, or capriciously or with a careless disregard whether one has the right so to act. The word 'wilful' as used in counts 2, 4, 6, 8, 10 and 12, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, with respect to these counts, wilfulness implies bad faith and an evil motive." (R. 290, 291, 292).

Later the jury made inquiry regarding the instructions on the word "willfully" pertaining to Counts II, IV, VI, VIII, X and XII, that is, the even Counts, and the Court again instructed them in the same words as above, limiting the instruction to the definition of the word "willful" as it applied to the even Counts, i.e., omitting the first sentence above (R. 293).

In *U. S. v. Murdock*, 1933, 290 U.S. 389, the Supreme Court had occasion to analyze the meaning of the word "willfully" as it was used in Section 1114(a) of the Revenue Act of 1926, and Section 146(a) of the Revenue Act of 1928, both of which sections are in the identical words of Section 2707(b) of the Internal Revenue Code of 1939 involved herein. The Court stated at 290 U.S., pages 394 and 395:

"... when used in a criminal statute it [wilfully] it generally means an act done with a bad purpose (cit); without justifiable excuse (cit); stubbornly, obstinately, perversely, (cit) . . . without ground for believing it is lawful (cit), or conduct marked by careless disregard whether or not one has the right so to act (cit)."

And later on when dealing with the word “willfully” as applied to the felony sections of the Internal Revenue Statutes, the Supreme Court stated in *Spies v. U. S.*, *supra*, 317 U.S. at pages 497-498 and 499:

“... willful as we have said, is a word of many meanings, its construction often being influenced by its context. *U. S. v. Murdock*, 290 U.S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness.”

* * * * *

“Willful but passive neglect of the statutory duty may constitute the lesser offense, . . .”

In *U. S. v. Di Silvestro*, 1957, 147 F.Supp. 300, 304, Judge Lord of the Eastern District of Pa. had occasion to address himself to this question in analyzing the sufficiency of the evidence of willfulness in a “failure to file” case. He too interpreted *Spies* as calling for a dual standard between misdemeanor and felony cases:

“The essentials of willfulness are seldom successfully defined, in these tax cases, in the abstract, see *Forster v. United States*, 9 Cir., 1956, 237 F.2d 617, 619; *Murdock v. United States*, 1933, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381. That the present ‘lesser offense’ of a misdemeanor requires a showing considerably less positive than required for a conviction under the felony statute counterpart of the act here in question, 26 U.S.C.A. § 7201, formerly § 145(b), is neverthe-

less clear, *Spies v. United States*, 1943, 317 U.S. 492. . . .”

In *U. S. v. Murdock*, *supra*, the trial court refused to submit to the jury the bona fides of the Defendant's refusal to give information to the Internal Revenue Agents as required by the statute on the ground of self-incrimination and possible prosecution under State statutes but to the contrary in effect directed the jury to return a verdict of guilty. See also *U. S. v. Morissette*, 342 U.S. 246.

A similar issue was presented, where the penalty section of the statute § 2707(a) of the Internal Revenue Code of 1939, was involved, in *Kellems v. U. S.*, D.C. Conn. 1951, 97 F.Supp. 681. In that case Miss Kellems had taken the position that she was not responsible for the penalty because she had refused to withhold the tax on the ground that the statute was unconstitutional. The analogy between this situation and that involved in *Murdock* is at once apparent. Judge Hincks defined the meaning of the word “willful” in the statute as “ ‘without reasonable cause’, that is to say, ‘capricious’ ”, 97 F.Supp., page 682. He then went on to summarize the evidence to determine whether or not the actions of Miss Kellems based on her stated position that the law was unconstitutional were in fact in good faith, or conversely, whether the refusal to withhold the tax was “without reasonable cause”.

The requirement of *Murdock* is that the term “willful” be defined to mean something more than mere carelessness or negligence or inadvertence. *Pappas v.*

U. S., 10 Cir. 1954, 216 F.(2d) 515, 519. There is no question but that the instruction given here by the trial court satisfied the test. The words "with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act" are either identical to, synonymous with, or in the same category of meaning as the words used in summary by the Supreme Court in *Murdock* to define the word "willful". The selection of the particular words in this case at the trial level was made in order to adopt the ones most descriptive of the conduct of the Defendant as demonstrated by all the evidence. At the same time no comment was made on the evidence by the trial judge (R. 240-241, 275).

It should also be pointed out that the possibility of carelessness or negligence or inadvertence is negatived in the Indictment which in each instance alleges that the Defendant "well knowing his duty and obligation to make such return, did willfully and knowingly fail to. . . ." (R. 4-14). See *Nickell v. U. S.*, 9 Cir. 1908, 161 Fed. 702, 706. Moreover, the Court instructed the jury that "an act is done or omitted knowingly if done or omitted voluntarily and purposely and not because of mistake or inadvertence or other innocent reason" (R. 268).

With the exception of *Yarborough v. U. S.*, 4 Cir. 1956, 230 F.(2d) 56, cert. den. 351 U.S. 969, none of the cases cited by Appellant (Br. 25) supports his contentions with respect to the issue of willfulness and the proper definition thereof as applicable to a

“failure to file” case. Each of those cases involved tax evasion, wherein the requirements of the *Spies* case, *supra*, must be satisfied. But *Spies* is not in point when considering the proper definition of willfulness in a “failure to file” case, with the exception of the dicta therein cited above. *Pappas v. U. S.*, *supra*, 216 F.(2d) at page 519.

In *Yarborough v. U.S.*, *supra*, the Court approved the following instructions as applicable to willful failure to file tax returns:

“... the word ‘wilful’ when used in a criminal statute means an act done with a bad purpose, or one done without justifiable excuse, or one done stubbornly, or obstinately, perversely, with a bad motive”.

Although the Courts quite often include as part of the definition of the word “willful” as applicable to tax statutes, the terms “evil motive”, or “bad motive”, it is believed that the use of the word “motive” should best be avoided in instructing on the question of willfulness and criminal intent. In this regard the standard instruction which has been given with approval time and time again in criminal cases was given by the trial judge in this case (R. 269):

“Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done. Personal advancement and financial gain are two well recognized motives for much of human conduct. These laudable motives may prompt one person to volunteer acts

of good, another to volunteer acts of crime. Good motive alone is never a defense where the act done is a crime. If a person intentionally does an act which the law denounces as a crime, motive is immaterial except insofar as evidence of motive may aid in determination of the issue as to intent.”

A careful reading of *Murdock* indicates that the descriptive term “evil motive” is merely used to define the converse of good faith and therefore is merely a general characterization of the previously summarized definition of the word “willfully” as found at pages 394 and 395 of 290 U.S., and as used in substantially the same form in the instructions in this particular case.

Appellant again relies on his carefully selected portions of the record referred to above in his Statement of Facts and contends that, based thereon, the issue of the bona fides of his delinquencies should have been submitted to the jury and that an issue of good faith was raised thereby. It is submitted that the question of whether any substantial issue of that nature is involved would require a review of the entire record which the Appellant has failed to designate. 4A C.J.S., *Appeal and Error*, § 1182b, page 1306; *Sharp v. U. S.*, 5 Cir. 1922, 280 Fed. 86, 89, cert. den. 260 U.S. 730. See *Yarborough v. U. S.*, *supra*, 230 F.(2d) at page 60.

The only scintilla of evidence which might raise the question of good faith is the excuse Appellant gave on the stand, that he did not file his returns

because he did not have the money to pay the taxes and thought the taxes must be paid when the returns were filed. In the same breath he admitted lying to the Internal Revenue Agents by representing to them upon inquiry that the returns had been mailed (R. 196). And he made the statement in the face of the testimony of his own bookkeeper, Mr. Watanabe, that he had been advised that the payment need not accompany the return (R. 86, 133). This, together with all the overwhelming evidence appearing in the record as a whole, most of which is not now before this Court, clearly established that this defense had no substance to it whatsoever.

But even giving Appellant the benefit of the doubt on the record that is now before this Court, he cannot complain for other reasons. Inability to pay the taxes is not a good legal reason for failure to file a tax return, although such evidence is admissible and may be considered along with all the other evidence in the case in determining whether the delinquent's action in failing to file the returns was willful. *Yarborough v. U. S.*, *supra*, 230 F.(2d) at page 60; *U. S. v. Di Silvestro*, *supra*, 147 F.Supp. at page 304. This does not necessarily mean that the Court is obligated to instruct the jury specifically on this isolated subject, particularly where the Court has declined to comment on the evidence. *U. S. v. Herskovitz*, 2 Cir. 1954, 209 F.(2d) 881, 886. As indicated above it is clear from the *Murdock* case that the question of good faith is negatived by the type of instruction given herein and the definitions of the word "willfulness" as appear

in that case. And so long as those definitions are a correct statement of the law, approved by the Supreme Court, there is no requirement that the Appellant be allowed numerous proposed instructions, in many cases incorrectly stating the law, *Blalack v. U. S.*, 6 Cir. 1946, 154 F.(2d) 591, 597, cert. den. 329 U.S. 738, reh. den. 329 U.S. 828; and each invitation to acquit. *Forster v. U. S.*, 9 Cir. 1956, 237 F.(2d) 617, 621.

Moreover, after instructing the jury on the subject of willfulness and intent as follows:

“ . . . An omission to act is done wilfully if done voluntarily and purposely and with the specific intent to fail to do that which the law requires to be done. A person who . . . knowingly fails to do an act which the law requires, purposely intending to violate the law, acts with specific intent.” (R. 268),

the trial judge went on to give the general instruction on the proof of intent by circumstantial evidence and ended with the following:

“In determining the issue as to the intent, the jury is entitled to consider *any statements made* and acts done or omitted *by the accused* and all facts and circumstances and evidence which may aid in determination of the state of mind.” (Emphasis added) (R. 268, 269).

This was a general instruction without any unnecessary comment on the evidence which placed the bonafides of Appellant's delinquencies before the jury.

With the foregoing in mind, we should examine the proposed instructions set forth by the Appellant, the refusal to give which he complains of as error.

First of all it should be reemphasized that at the settling of instructions the Court went on record as declining to comment on the evidence (R. 240-241). This occurred in connection with Plaintiff's proposed Instruction No. 8 (R. 22, 23). In addition to refusing Plaintiff's proposed Instruction No. 8 on this ground, the Court also refused, apparently for the same reason, Plaintiff's proposed Instruction No. 10, and the second paragraph of Plaintiff's proposed Instruction No. 11 (R. 24, 247). This policy was followed consistently throughout the settling of instructions and as a result nowhere in the instructions as given does there appear any comment on the evidence. Moreover, the Court announced this position to the jury (R. 275). Therefore, so long as the legal definitions given in the instructions were correct, the Appellant cannot complain of the refusal to give his proposed Instructions numbered 40, 41, 42 and 45 (R. 17-19), inasmuch as each of those involved comments on the evidence. *U. S. v. Herskovitz, supra*. Now with reference to each of the proposed instructions which were refused.

Appellant's Proposed Instruction No. 37 (R. 17):

"You are instructed that before you can find the Defendant guilty of the charges contained in the indictment, you must first find, from the evidence, that he was wilful. The wilfulness required in a criminal action must be established by evidence that shows affirmative or positive acts on the part

of the Defendant, that, in and of themselves, spell out, specifically, bad purpose or evil motive. If you do not find such specific acts in the evidence, then you must return a verdict of 'Not Guilty'."

This instruction would not have been objectionable if restricted to the felony Counts. However, since Appellant made no effort to distinguish between the two types of offenses in his proposed instructions, the Court could do no more than to refuse the instruction as having been covered by other instructions (R. 259). And certainly the requirement of "affirmative or positive acts on the part of Defendant" is inconsistent with the definition of "willful but passive neglect of the statutory duty" as given by the Supreme Court in *Spies v. U. S.*, *supra*, 317 U.S. at page 449. *U. S. v. Di Silvestro, supra*.

Appellant's Proposed Instruction No. 38 (R. 17):

"If you find that the filing of the returns and the payment of the taxes due were not delayed by Mr. Abdul with any bad purpose or evil motive on his part, then you must find him 'Not Guilty'."

The foregoing instruction was also refused as covered (R. 259). Again there was no attempt to distinguish between the felony and the misdemeanor Counts here, and the instruction is in the nature of a comment on the evidence inasmuch as it used the word "delayed" in connection with the filing of the returns and the words "payment of the taxes . . . by Mr. Abdul", whereas, the issue is not the delay but the

failure to file the returns when due. Also, the evidence is that the returns were *extracted* and the taxes *collected from* the Appellant and not filed and paid by him. (R. 179, 180, 184-186).

Appellant's Proposed Instruction No. 40 (R. 17, 18):

"If you find from the evidence that the Defendant did make all tax returns required of him, even though paid late, that he did keep accurate records; that he supplied the government agents with information requested even if delayed at times; that he did eventually pay the taxes due and that he truthfully accounted for his tax liability, then the Defendant cannot have acted with bad purpose or evil motive, and if you so find from the evidence, then you must return a verdict of 'Not Guilty'."

This proposed instruction was a clear attempt to have the Court usurp the functions of the jury (R. 223). Moreover, as indicated above, it distorted the evidence in the whole record to the extent that it was in the nature of argument by Appellant's counsel in summation. If the Court were commenting on the evidence and the instruction were not written in such distorted form, and, following the summary of "facts" contained therein, if it had terminated with the words to the effect that "you should consider these facts in determining whether or not the Defendant's failure to file the tax returns was willful", rather than the direction to acquit, then it might have been appropriate. See *U. S. v. Murdock, supra*. The same comment applies to the proposed Instructions

numbered 41, 42 and 45 that follow. The invitation or direction to acquit is entirely inappropriate to this type of instruction.

Appellant's Proposed Instruction No. 41 (R. 18):

"If you should find from the evidence that the defendant may have been impolite, crude, abrupt, trying or even irritating to any one or even all of the Internal Revenue Service employees and agents, none of these are evidence of bad purpose or evil motive or of wilfulness on the part of the defendant."

The same observations apply to the foregoing instruction as were made regarding Appellant's proposed Instruction No. 40 above.

Appellant's Proposed Instruction No. 42 (R. 18):

"If you find that it was the intention of Mr. Abdul to pay the taxes due when sufficient funds were available, then you must find him 'Not Guilty' of each and every count of the indictment."

This is an incorrect statement of the law. *Yarborough v. U. S.*, *supra*, 230 F.(2d) at pages 60-61; *U. S. v. Di Silvestro*, *supra*, 147 F.Supp. at page 304.

Appellant's Proposed Instruction No. 45 (R. 19):

"If you find from the evidence that the Defendant did disclose his true tax liability, then this is evidence that the necessary criminal wilfulness on his part was not present, and you must find him not guilty."

To the foregoing instruction the trial judge stated: "I do not think 45 is a correct statement of the law

applicable to the facts of this case.” (R. 226). This is a complete and utter distortion of the evidence since the Defendant did not disclose *any* tax liability.

Appellant’s Proposed Instruction No. 46 (R. 19):

“Before you can find the Defendant guilty of wilfulness you must be certain that the evidence shows specific intent, that is, you must be able to point to the specific acts which constitute the acts of wilfulness; if you cannot do so, then you must find the Defendant ‘Not Guilty’.”

This instruction was also refused as covered (R. 259). Moreover, as proposed, the instruction is not a correct statement of the law since it confuses the evidence with respect to willfulness with the question of specific intent. The Court gave the proper instruction on the question of specific intent (R. 268). It is also questionable whether specific intent, as it is properly defined in the law, is required in a “failure to file” or misdemeanor tax case. “Ignorance of the law is no defense to crime, except that, where wilfulness is an element of the crime, ignorance of a duty imposed by law may negative willfulness in failure to perform the duty.” *Yarborough v. U. S.*, *supra*, 230 F.(2d) at page 61. In that case the Court also approved the refusal of the trial judge to charge that ignorance of the law would constitute a defense to the charges contained in the indictment. 230 F.(2d) at page 60. See also *Forster v. U. S.*, *supra*, 237 F.(2d) at page 621.

It is conceded that an instruction in the form of that given in the *Yarborough* case and approved by the Fourth Circuit at 230 F.(2d), page 60, would have

been appropriate in this case. But no such instruction was offered. Moreover, the trial judge, as previously indicated, went on record as declining to comment upon the evidence, which he had the full right to do, and further so advised the jury. For this reason the adequacy of the instructions as given in the abstract with respect to the definition of "willfulness" must be the determining criterion. Since it has been demonstrated that they were legally sound and correct, there can be no finding of error in failure to give other proposed instructions which were refused on valid grounds as either unsound in law or already covered.

In summary, Appellant acknowledges that the term "willful" may have different meanings in different contexts, but goes on to argue as a matter of statutory construction that Congress must have intended that it have the same meaning in two consecutive sections of the same Act (Sections 2707(b) and (c), Internal Revenue Code of 1939, and Sections 7202 and 7203, Internal Revenue Code of 1954), even though the offenses involved are separate and distinct and are misdemeanors in one section and felonies in the other (Br. 27). But as we have demonstrated the Supreme Court in the *Spies* case has clearly set the pattern of distinction between the two types of willfulness. 317 U.S. at pages 497-499; and *U. S. v. Di Silvestro, supra*, 147 F.Supp. at page 304.

II.

THE COURT PROPERLY GAVE THE GOVERNMENT'S
REQUESTED INSTRUCTION NO. 22 TO THE JURY.

Appellant's Requested Instruction No. 22 (R. 25):

"The importance of your duties as jurors requires that you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this District that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books."

Objection was made to the giving of this instruction on the ground that it was more in the nature of comments and conclusions rather than instructions as to the law (R. 252), and that it was contrary to the law applicable and principally in tax cases (R. 283). No objection was made at the trial that the instruction constituted an invasion of the province of the jury and was an invitation, if not a direction to convict as the Appellant now argues. (Br. 28). Since this objection was never called to the attention of the trial judge, it is obvious that he had no opportunity to scrutinize the instruction in that light and to amend it accordingly if he considered it necessary. The ground for objection urged on appeal must be the same as that presented to the trial Court. *Bartlett v. U. S.*, 10 Cir. 1948, 166 F.(2d) 920, 927.

In any event the instruction was not in any way improper, particularly when considering it in light of all the other instructions and the evidence in the case.

In *U. S. v. Witt*, 2 Cir. 1954, 215 F.(2d) 580, 585, the Court held that the following instruction did not erroneously appeal to the jury to convict:

[Footnote 4]

“Now, ladies and gentlemen, if you find that the evidence respecting the defendants, or a defendant, is as consistent with innocence as with guilt, such defendant or defendants should be acquitted. If you find that the law has not been violated, you should not hesitate for any reason to find a verdict of acquittal. But, on the other hand, if you find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty, as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this.”

The similarity of the two instructions is at once apparent.

In *U. S. v. Link*, 3 Cir. 1953, 202 F.(2d) 592, 594, cited by Appellant (Br. 28), the charge complained of was as follows:

“ . . . But if on the other hand you find that the law has been violated as charged in this indictment, then you should not hesitate, because of sympathy, prejudice or any extraneous consideration of any kind, to render a verdict of guilty as a clear warning to all that crime cannot be committed with impunity in the United States and go unpunished. THE PEOPLE OF THIS STATE AND OF THE UNITED STATES ARE ENTITLED TO BE ASSURED OF THIS CONVICTION.” (Emphasis supplied.)

The Court held that only the capitalized portion of the charge, that is, "the people of this State and of the United States are entitled to be assured of this conviction", was prejudicial to the defendant and, therefore, erroneous. By inference, therefore, the Court approved the balance of the instruction and it is also quite similar to the instruction given in this case.

The case of *Billeci v. U. S.*, D.C. Cir. 1950, 184 F. (2d) 394, cited by the Appellant (Br. 28), is not in point. There the trial Court had charged the jury in essence that if they believed the Defendants had committed the crime of which they were charged, they should find a verdict of guilty but if they did not believe that the defendants had committed the crime, they should find a verdict of not guilty. The Appellate Court said that statement was not the law since it failed to incorporate the element of reasonable doubt. 184 F.(2d) at page 399. A second instruction held to be erroneous by the Appellate Court was in effect a direction to the jury to bring in a verdict. 184 F.(2d) at page 401.

But even if the instruction taken alone were found to be erroneous, no ground has been established for reversal as a result thereof since no injury has been shown. Rule 52(a), Federal Rules of Criminal Procedure, U.S.C.A. The entire charge to the jury must be examined in order to determine whether the error, if any, was harmful.

An examination of the instructions shows that the instruction complained of was given in conjunction

with lengthy charges regarding reasonable doubt, the presumption of innocence and the Government's burden of proof in criminal cases (R. 264, 273-274, 277-278). Furthermore, the instructions concluded in the following manner (R. 281-282):

"If the accused be proved guilty, say so. If not proved guilty, say so. Remember at all times that a defendant is entitled to acquittal if any reasonable doubt remains in your minds.

"Remember also the question before you can never be, will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty."

Surely these concluding paragraphs cured any possible invitation to convict, which might have been inherent in the single paragraph Appellant complains of.

The burden to show reversible error is on the Appellant. *U. S. v. Reed*, 2 Cir. 1938, 86 F.(2d) 785, 786, cert. den. 305 U.S. 612. And when guilt is clearly established by competent evidence, error in the charge to the jury which does not affect the substantial rights of the accused does not call for the reversal of a conviction. *U. S. v. Amadio*, 7 Cir. 1954, 215 F.(2d) 605, 614, rev. on other grounds 348 U.S. 892; *Schwartz v. U. S.*, 9 Cir. 1947, 160 F.(2d) 718, 720.

III.

**THE COURT PROPERLY REFUSED TO STRIKE
THE TESTIMONY OF JAMES WALKER.**

After establishing the corpus delicti the Government called James Walker to testify to a conversation held with the Defendant on February 1, 1955 during the period encompassed by the Indictment. He testified that the Defendant was trying to collect a debt which he owed him, and that he advised the Defendant that he was not in a position to pay because he was indebted to "Uncle Sammy" for some excise taxes which he was paying off monthly, and that his first obligation was to the Federal Government. He stated that the Defendant replied (R. 176):

"I don't give a damn for Uncle Sammy. I come first and I will get my money before Uncle Sammy and I have ways of doing it."

Appellant moved to strike on the ground that the testimony was immaterial and irrelevant (R. 177). When this motion was denied Appellant moved for a mistrial, which motion was also denied.

Appellant assumes a conclusion when he states that an expression of disregard for another taxpayer's debtor relationship to the United States is not pertinent when made by one on trial for alleged tax offenses (Br. 29). Although he makes no argument in support of his conclusion, he perhaps reasons mistakenly that the jury could not fairly infer from the quoted testimony that Appellant was contemptuous of the public revenue and of every citizen's duty to pay his fair share of the national tax burden.

Certainly Appellant cannot be contending that such a state of mind is irrelevant to the issue of willfulness in his failure to fulfill his own tax obligations.

If, then, the question is whether the jury can be permitted to draw an inference as to Appellant's state of mind from the witness Walker's testimony, the answer is clear. The Appellant's statement, "I don't give a damn for Uncle Sammy", is a direct expression of his state of mind. Further, his statement, "I come first and I will get my money before Uncle Sammy and I have ways of doing it," is strong circumstantial evidence that Appellant was contemptuous of the Revenue laws.

Essentially what Appellant is complaining about is the trial court's exercise of discretion in determining that the proffered testimony was admissible because it was sufficiently related to the issue of willfulness to be of some help to the jury in determining Appellant's state of mind.

A party's statements are always competent evidence against him unless they fall within some special exclusionary rule. Where they have been received in evidence, the fact that they may have only remote relevance to the issue being tried is not ground for reversal unless they are such as are clearly apt to have confused the jury's mind or to have improperly swayed its judgment. *Peoples Loan and Investment Co. v. Travelers Insurance Co.*, 8 Cir. 1945, 151 F.(2d) 437, 440. Much discretion is left to the trial court, and its ruling on the admission of evidence should be sustained if the testimony which is admitted tends

even remotely to establish the ultimate fact. *Clune v. U. S.*, 159 U.S. 590, 592-593; *Gordon v. U. S.*, 6 Cir. 1947, 164 F.(2d) 855, 860; 20 Am. Jur., *Evidence*, § 247.

IV.

THE COURT PROPERLY OVERRULED APPELLANT'S OBJECTIONS TO CERTAIN QUESTIONS ASKED HIM ON CROSS-EXAMINATION AND PROPERLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 54.

Appellant complains strenuously of certain questions asked him on cross-examination about the conduct of his business out of which the tax delinquencies arose, but the basis of his complaint is wrapped in mystery. After a thorough study of his argument (Br. 30-33) we are unable to find any cogent reason stated for this specification.

Appellant recognizes that the questions about his dishonest business practices were addressed to his credibility as a witness and for the purpose of impeachment. He complains that the Government did not offer any evidence of those practices in rebuttal. Leaving aside the anomaly inherent in his complaint that prejudicial evidence was not offered against him, we note that the Appellant himself states the obvious answer to his own objection, i.e., that impeachment on a collateral matter was involved, and in such a case the witness' denials of impeaching facts may not be contradicted by rebuttal evidence. *Herzog v. U. S.*, 9 Cir. 1955, 226 F.(2d) 561 (Br. 33).

Thus we find the Appellant in the curious position of complaining that the Government failed to introduce evidence prejudicial to him and simultaneously offering authority for the proposition that the evidence would not be admissible if offered.

Of course the well settled rule is that on cross-examination, for impeachment, a witness may be questioned concerning his dishonest practices, since his dishonesty bears on his credibility as a witness. But since the credibility of a witness is a collateral matter, the inquiry by cross-examiner is foreclosed by the witness' answer. *Simon v. U. S.*, 4 Cir. 1941, 123 F.(2d) 80, 85. This rule is well stated in *Rau v. U. S.*, 2 Cir. 1919, 260 Fed. 131, 136:

“When the defendant took the stand as a witness, he assumed a dual capacity; that of a defendant and that of a witness. As a witness, it was competent for the government to interrogate upon any competent subject for the purpose of impeaching his credibility as a witness, and in doing this, might enter the field of matters collateral to the main issue; but they were bound by the answers, and were not permitted to call witnesses in rebuttal tending to show that the defendant was guilty of crimes other than charged in the indictment. (Cit.) To permit this testimony violated his rights as a defendant, for it charged him with other crimes for which he was not indicted or on trial.”

The *Rau* case is directly in point here. There the defendant had taken the stand to testify in his own behalf and on cross-examination was questioned about his dishonest business practices. The conviction was

reversed not because of the questions asked but because the Government did there what it is accused of not doing here: it offered rebuttal evidence to contradict the defendant's denials of dishonest practices.

The cases cited by Appellant are of similar tenor. In *Herzog v. U. S.*, *supra*, 226 F.(2d) at page 565, defendant had sought to impeach one of the Government's witnesses by questioning him on cross-examination about his troubles with the OPA. Subsequently he sought to introduce evidence to contradict the witness' denials. The evidence was excluded as an attempt to impeach on a collateral matter.

It will be noted that in both the *Rau* and *Herzog* cases the courts recognized that the questions asked of the witness were proper cross-examination.

Bloch v. U. S., 9 Cir. 1955, 221 F.(2d) 786, 790, cited by Appellant, is not in point here. The questions complained of there involved the morals of the Defendant, and were relevant to neither the issues of the case nor the credibility of the witness.

The Appellant here, unlike the Defendant in *Bloch*, had already put his character in issue (R. 278-280). Consequently, even the questions asked in the *Bloch* case might have been proper here. See also *Michelson v. U. S.*, 1948, 335 U.S. 469. Nevertheless, the cross-examination was restricted to matters relating specifically to his practices in the business out of which his tax delinquencies arose.

Since the questions were proper, certainly the Defendant's requested Instruction No. 54 was erroneous and was properly refused by the trial judge. Again

Appellant would undoubtedly have been entitled to an appropriate instruction on this subject, but none was offered. (See the discussion on this subject in Argument I above.)

Nevertheless, the Court did instruct the jury adequately in the following words (R. 273):

“The defendant here is to be tried only on the evidence which is before the jury and not upon suspicions that may have been elicited by questions of counsel, or answers which were not permitted.”

CONCLUSION.

It is respectfully submitted that the trial court did not err in any matter brought before it in the trial of this case, and that judgment of that court should be affirmed.

Dated, Honolulu, T.H.,
November 12, 1957

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No. 15,523
United States Court of Appeals
For the Ninth Circuit

DANIEL L. ABDUL,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**On Appeal from the United States District Court
for the District of Hawaii.**

APPELLANT'S OPENING BRIEF.

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FILED

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No. 15,523

United States Court of Appeals For the Ninth Circuit

DANIEL L. ABDUL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The United States District Court for the District of Hawaii, hereinafter referred to as the "Court", had jurisdiction to try the indictment (R. 3-15) returned against Appellant under the provisions of §3231, Title 18, U.S.C. This Court has jurisdiction of Appellant's appeal from his conviction on six counts of said indictment under the provision of §1291, Title 28, U.S.C.

STATEMENT OF THE CASE.

On March 16, 1956, an indictment in twelve counts was filed against Appellant in the District Court.

The odd numbered counts are misdemeanor charges. In Count I of the indictment Appellant is charged as follows:

“That during the period from October 1, 1953, to December 31, 1953, inclusive, Daniel L. Abdul was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal Income Taxes and Federal Insurance Contributions Act Taxes in the sum of \$2,987.58; that by reason of such facts the said Daniel L. Abdul was required after December 31, 1953, and on or before January 31, 1954, to file with the Director of Internal Revenue for the District of Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii, an Employer's Quarterly Federal Tax Return; and that said Daniel L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employer's Quarterly Federal Tax Return, in violation of Section 2707(b), Internal Revenue Code of 1939, 26 United States Code, Section 2707 (b).”

Similar charges are made against Appellant in Count III for the first quarter of 1954, in Count V for the

second quarter of 1954, in Count VII for the third quarter of 1954, in Count IX for the first quarter of 1955, and in Count XI for the second quarter of 1955.

The even numbered counts are felony charges. In Count II of the indictment Appellant is charged as follows:

“That on or about the 31st day of January, 1954, in the District of Hawaii, Daniel L. Abdul, the identical person named in Count I of this Indictment, who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 4th quarter of the year 1953 ending December 31, 1953, deducted and collected from the total taxable wages of the employees of said corporation such taxes in the sum of \$2,987.58, did wilfully fail to truthfully account for and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper officer of the United States, said Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages due and owing to the United States of America for said quarter ending December 31, 1953, in violation of Section 2707 (c), Internal Revenue Code of 1939, 26 United States Code, Section 2707 (c).”

Similar charges are made against Appellant in Count IV for the first quarter of 1954, in Count VI

for the second quarter of 1954, in Count VIII for the third quarter of 1954, in Count X for the first quarter of 1955, and in Count XII for the second quarter of 1955.

Counts I, III and V are laid under Section 2707 (b) of the Internal Revenue Code of 1939. Counts VII, IX and XI are laid under §7203 of the Internal Revenue Code of 1954 (26 U.S.C. §7203). Counts II, IV and VI are laid under §2707 (c) of the Internal Revenue Code of 1939. Counts VIII, X and XII are laid under §7202 of the Internal Revenue Code of 1954 (26 U.S.C. §7202).

Appellant pleaded not guilty to each count of the indictment on September 21, 1956 (R. 298). The case was tried before the Honorable Jon Wiig, District Judge, on November 26, 27, 28, 29, 30 and on December 3, 4, and 5, 1956 (R. 298-302). On December 5, 1956, the jury returned a verdict of guilty as to each of the odd numbered counts and not guilty as to each of the even numbered counts.

Appellant, who is a Hawaiian born married man with two children was the president and general manager of Home Furniture Company, Limited, a Hawaiian corporation, during the period covered by the Indictment (R. 58). It was in this capacity that he was charged in the indictment as stated above (R. 3-15). However, there is no conflict in the evidence that by February 10, 1956, or more than six months before the indictment was returned, Appellant had paid all taxes due and all penalties and interest assessed on such taxes for the six quarters which are

covered by the indictment (R. 182-184, 188-190). In fact, Mr. Stratton, one of the government's agents who worked on the collection of these taxes when asked the following question:

“Q. And, as a matter of fact, Mr. Stratton, when the money had been counted up in the till of the Internal Revenue Service, it was found that he (Appellant) had overpaid by about \$117 which was returned, is that correct?

stated, “I believe you are right on that, sir” (R. 184).

It was further stipulated by the Government that the returns covered by the indictment were accurate as filed (R. 187). Mr. Watanabe, a witness called by the Government and formerly a bookkeeper for Appellant's corporation, testified that the returns were accurate (R. 121), and that information with reference to the tax liability of Appellant's corporation was always accurately available to representatives of the Internal Revenue Service in the books and records of the corporation (R. 121-122).

The return for the last quarter of 1953 (Counts I and II) was filed September 15, 1955, (Exhibit 2) and taxes, penalty and interest due thereon paid by February 3, 1956 (R. 188). The return for the first quarter of 1954 (Counts III and IV) was filed February 28, 1955 (Exhibit 4) and the taxes, penalty and interest due thereon paid by May 19, 1955 (R. 188). The return for the second quarter of 1954 (Counts V and VI) was filed February 28, 1955 (Exhibit 5) and the taxes, penalty and interest due thereon paid by January 30, 1956 (R. 189). The return for the

third quarter of 1954 (Counts VII and VIII) was filed February 28, 1955 (Exhibit 7) and the taxes, penalty and interest due thereon paid by May 1, 1955 (R. 189). The return for the first quarter of 1955 (Counts IX and X) was filed November 23, 1955 (Exhibit 9) and the taxes, penalty and interest due thereon paid by February 10, 1956 (R. 190). The return for the second quarter of 1955 (Counts XI and XII) was filed November 23, 1955 (Exhibit 10) and the taxes, penalty and interest due thereon paid by February 6, 1956 (R. 190).

Mr. Watanabe, testified that he prepared these returns prior to their respective due dates and that checks were also prepared to accompany the returns, but that Appellant did not file the returns or put through the checks because of insufficient funds (R. 80, 84, 111). The following questions and answers (R. 84) are a part of Mr. Watanabe's testimony:

"Q. At the time you prepared those tax returns during the time that they were on his (Appellant's) desk or in that folder, was there money available to pay this?

A. Well, our check record shows that they were overdrawn, heavily overdrawn.

Q. On what occasion?

A. On all occasions.

Q. All the time?

A. Just about all the time."

In fact, once check for \$1,794.36 dated December 27, 1954, and put through in March, 1955, in payment of taxes due for the second quarter of 1954 was referred to maker because of insufficient funds (R. 111, Ex-

hibit 6). Mr. Watanabe further testified that although Appellant was paid a monthly salary of \$1600.00, \$800.00 of this was applied against his loan account with the corporation and that he sometimes was unable to cash his check for the remaining \$800.00 and his wife was unable to cash her salary check because of insufficient funds (R. 131-132). Mr. Watanabe testified that he had instructed Appellant that the check should accompany the return (R. 132-133), though he also stated that on one occasion he told Appellant that if he didn't have the funds he should send in the returns (R. 133).

Reconciliation statements contained in Defendant's Exhibit H, the corporation ledger book, reflect the following month end deficit bank balances: December 31, 1953, \$1,523.26, March 31, 1954, \$12,671.35, June 30, 1954, \$8,386.41, September 30, 1954, \$6,790.02, December 31, 1954, \$12,588.81.

Home Furniture Company, Ltd., was a retail furniture store which sold furniture on an installment contract basis and then discounted the contracts (R. 56, 80-82). Appellant testified that, "We only paid the things that we just absolutely had to pay in order to keep the doors open." (R. 195). With reference to the late filing and late payments and his stalling of agents of the Internal Revenue Service he stated (R. 196-197):

"A. I knew that the returns had not been mailed, that I was trying to gain time in which to raise the cash to pay the taxes. At no time did I ever try not to pay it. I just didn't have the funds to pay it.

Q. And what were your reasons for continuously putting them off on appointments and asking to come back later?

A. Hoping to be able to find some source, raise the funds that we needed, have a sale, move a group of merchandise to get cash to be able to pay the taxes."

Appellant was also asked these questions and answered them as follows (R. 211):

"Q. And you knew that each one of those tax returns was due at the end of that month in question?

A. Yes, I do.

Q. And with that knowledge you didn't file them?

A. Only because we didn't have the money on hand to pay it with the report."

The Government called a Mr. Walker, formerly from Brooklyn it is believed, to the stand who testified that Appellant was pressing him to pay an overdue account, and that he (Walker) told Appellant he had tax obligations to "Uncle Sammy" which he had to pay first. He stated that Appellant replied: "I don't give a damn for Uncle Sammy. I come first and I will get my money before Uncle Sammy and I have ways of doing it." Appellant's motions to strike and for a mistrial were denied (R. 175-177).

On cross-examination of Appellant government counsel asked over objections, a number of questions concerning implied unethical business practices of Appellant which had nothing to do with his delinquent filing of tax returns and delinquent payment of the

taxes due thereon, ostensibly for impeachment purposes and to test his credibility. At no time did the Government ever offer evidence to rebut Appellant's denial of the unethical practices insinuated in the questions.

The major difficulty in connection with the settling of instructions was in the definition of the word "wilfully" as it appears in each count of the indictment. In substance, it was Appellant's position that the term requires proof of an evil motive or bad purpose as to both the felony and the misdemeanor counts. It was the Government's position that as to the misdemeanor counts the definition of "wilfully" was different from the felony counts; that if the failure to file or to pay the taxes due on time was done "without grounds for believing that one's act is lawful, or without reasonable cause, or capriciously or with careless disregard whether one has the right so to act," that then such failure was "wilful" whether evil motive or bad purpose was involved or not (R. 214-259). The District Court adopted the Government's view of the question (R. 269, 287-288, 290-291, 293-294). That this question seriously troubled the jury is shown by the fact that the jury returned on two occasions from its deliberations to ask that the instruction defining the term "wilfully" be repeated (R. 290-291, 293-294).

The case was submitted to the jury on December 5, 1956, and after it had been in their hands for approximately nine hours a verdict of guilty as to each of the odd-numbered (misdemeanor) counts was re-

turned as stated above (R. 302). On this conviction Appellant was sentenced to a total of 18 months imprisonment and to pay the costs of the prosecution (R. 303).

Appellant's motion for a new trial, raising substantially the same points raised on this appeal, was denied by the District Court (R. 27-29, 302-303). From said judgment Appellant duly perfected this appeal (R. 32-33, 303).

STATUTES INVOLVED.

§2707 (b) of the Internal Revenue Code of 1939, 53 Stat. 290, (Counts I, III and V):

“Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.”

§7203, Internal Revenue Code of 1954, 26 U.S.C. §7203, 68A Stat. 851 (Counts VII, IX and XI):

“Any person required under this title to pay any estimated tax or tax, or required by this title

or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

§2707 (c) of the Internal Revenue Code of 1939, 53 Stat. 290 (Counts II, IV and VI):

"Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than five years, or both, together with the costs of prosecution."

§7202, Internal Revenue Code of 1954, 26 U.S.C. §7202, 68A Stat. 851 (Counts VIII, X and XII):

"Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law,

be guilty of a felony, and upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.”

§1627 of the Internal Revenue Code of 1939, 57 Stat. 126 (Withholding Taxes):

“All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter.”

§1430 of the Internal Revenue Code of 1939, 53 Stat. 178, amended Aug. 10, 1939, c. 666 Title IX, Sec. 903, 53 Stat. 1400:

“All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 or section 1800, and the provisions of section 3661, shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter.”

SPECIFICATION OF ERRORS.

1. *The Court erred in its instruction to the jury on the meaning of the term “wilfully” as used in the odd or misdemeanor counts of the indictment. In this connection the Court first instructed the jury as follows (R. 269):*

“Now, as to the other counts of the indictment, one, three, five, seven, eight [sic] and eleven, gen-

erally speaking, what I have just read to you is applicable with this limitation on the definition of the word 'wilful' in failing to make a tax return. In that connection it means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard of whether one has a right so to act."

Following objections made by Appellant's counsel the Court gave the following additional instruction to the jury (R. 287-288):

"Ladies and gentlemen of the jury, counsel for the defendant have called to my attention an oversight in my instructions concerning the definition of wilfulness or doing something wilfully which, as you know by now, is a very important element in this case. So I am going to supplement my instructions in this manner and perhaps it will clarify it for you. And this is a supplemental instruction. In other words, an addition, except for this repetition. The word 'wilful' as used in counts 1, 3, 5, 7, 9, and 11, that is, failing to make a tax return, means with a bad purpose *or* without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act. With regard to the other counts 2, 4, 6, 8, 10 and 12, I supplement my instructions on the definition of wilful in the following language: An act is done wilfully if one voluntarily and purposely and with a specific intent to do that which the law forbids. Wilfulness implies a bad faith and an evil motive." (Emphasis supplied).

After deliberating for awhile the jury inquired further as to the meaning of "wilfulness" and the Court gave this instruction (R. 290-291):

"The word 'wilful' as used in counts 1, 3, 5, 7, 9 and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act. The word 'wilful' as used in counts 2, 4, 6, 8, 10 and 12, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, *with respect to these counts*, wilfulness implies bad faith and an evil motive." (Emphasis supplied).

Later when the jury inquired further concerning this matter they were instructed that (R. 292):

"The types of wilfulness involved in these two different charges are separate and distinct and I ask you to pay particular attention to me when I describe to you what is meant in each instance. The word 'wilful' as used in counts 1, 3, 5, 7, 9, and 11, that is, in failing to make a tax return, means with a bad purpose *or* without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act.

The word 'wilful' as used in the remaining counts, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and

with intent to defraud the Government of that tax by any affirmative conduct.

Further, with respect to *these counts*, wilfulness implies bad faith and an evil motive.” (Emphasis supplied).

Appellant objected consistently to the definition of “wilfully” given by the Court as to the misdemeanor counts it being Appellant’s expressed position that “wilfully” has the same meaning in both the felony and the misdemeanor counts and that an offense under the statutes here involved is not committed “wilfully” unless done with an evil motive or bad purpose. (R. 236-239, 283-286, 288-289, 292-293, 294).

With reference to the supplemental instruction given the jury as set out above Appellant objected (R. 292-293) to the Court’s failure to give his suggested instruction No. 35 which had previously been given as follows (R. 274):

“You are instructed that if from the evidence you find that the defendant did not file tax returns at the time or times required by law or that he did not pay the tax required by law, such failures in themselves do not constitute wilfulness under the law. Unless you find that the filing and paying late of such taxes were acts with a bad purpose or an evil motive. If the Government proof goes no further than to establish a state of facts for [sic] which the inference of untruthfulness or wilfulness may not be reasonably drawn, then the Government has failed to establish the charges beyond a reasonable doubt. And under such circumstances it

would be the duty of the jury to acquit the defendant.”

It is submitted further that the Court erred in refusing to give the following instructions requested by Appellant which relate to the subject of “wilfulness” (R. 17-19):

No. 37

“You are instructed that before you can find the Defendant guilty of the charges contained in the indictment, you must first find, from the evidence, that he was wilful. The wilfulness required in a criminal action must be established by evidence that shows affirmative or positive acts on the part of the Defendant, that, in and of themselves, spell out, specifically, bad purpose or evil motive. If you do not find such specific acts in the evidence, then you must return a verdict of ‘Not Guilty’.”

No. 38

“If you find that the filing of the returns and the payment of the taxes due were not delayed by Mr. Abdul with any bad purpose or evil motive on his part, then you must find him ‘Not Guilty’.”

No. 40

“If you find from the evidence that the Defendant did make all tax returns required of him, even though paid late, that he did keep accurate records; that he supplied the government agents with information requested even if delayed at times; that he did eventually pay the taxes due and that he truthfully accounted for his tax li-

ability, then the Defendant cannot have acted with bad purpose or evil motive, and if you so find from the evidence, then you must return a verdict of 'Not Guilty'."

No. 41

"If you find from the evidence that the defendant may have been impolite, crude, abrupt, trying or even irritating to any one or even all of the Internal Revenue Service employees and agents, none of these are evidence of bad purpose or of evil motive or of wilfulness on the part of the defendant."

No. 42

"If you find that it was the intention of Mr. Abdul to pay the taxes due when sufficient funds were available, then you must find him 'Not Guilty' of each and every count of the indictment."

No. 45

"If you find from the evidence that the Defendant did disclose his true tax liability, then this is evidence that the necessary criminal wilfulness on his part was not present, and you must find him not guilty."

No. 46

"Before you can find the Defendant guilty of wilfulness you must be certain that the evidence shows specific intent, that is, you must be able to point to the specific acts which constitute the acts of wilfulness; if you cannot do so, then you must find the Defendant 'Not Guilty'."

2. *The Court erred in giving the Government's requested instruction Number 22 to the jury.* This instruction was given as follows (R. 278):

"The importance of your duties as jurors requires that you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this district that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books."

Appellant duly noted his objections to the giving of this instruction (R. 252, 283).

3. *The Court erred in refusing to grant Appellant's motion to strike the testimony of Mr. Walker set out in haec verba, supra, p. 8, and in refusing Appellant's motion for a mistrial based on Walker's testimony* (R. 175-177). The Court further erred in refusing Appellant's requested instruction No. 48 providing as follows (R. 20):

"You are instructed to disregard all of the testimony of the witness James or Jimmy Walker."

4. The Court erred in refusing (R. 227) to give Appellant's requested instruction No. 54 which reads as follows:

"You are hereby instructed that all testimony relative to the merchandising and advertising techniques of the Defendant and that all testimony relative to specific sales by Home Furniture

Company, Limited, is irrelevant and shall be disregarded by you.”

During the trial the prosecutor had asked repeated questions of Appellant implying that he engaged in unethical and dishonest business practices. Objections were made that these questions were immaterial and irrelevant (R. 198, 200, 202, 204, 205 and 206). The questions and objections are quoted in full herein below in the argument of this assignment. On the basis of the prosecutor’s representation that they were designed to impeach the Appellant’s credibility the Court overruled the objections even though the subject matter of the questions was entirely collateral (R. 202). However, the Government never offered any evidence to rebut Appellant’s denial of the charges implied in the questions.

ARGUMENT.

I.

THE COURT ERRED IN INSTRUCTING THE JURY AS IT DID ON THE MEANING OF “WILFUL”.

As noted above the Court in its instruction to the jury drew an emphatic distinction between the meaning of the term “wilfully” as used in the misdemeanor counts and as used in the felony counts. In substance the Court advised the jury that the conduct of Appellant must have been with evil motive or bad purpose (wilful) in order to find him guilty of the felony counts, but that mere negligence or “a careless dis-

regard of whether one has a right so to act" is sufficient to find him guilty of the misdemeanor counts. This distinction which Appellant submits was both erroneous and prejudicial was reemphasized each time the jury interrupted its deliberations to request additional instruction on the subject.

There are many federal cases in which the meaning of "wilfully", as used in §145 (b) of the Internal Revenue Code of 1939 as amended, is discussed and there are a few cases in which the meaning of "wilfully", as used in §145 (a) of the Internal Revenue Code of 1939 as amended, is commented upon. However, counsel for Appellant has found scant authority on the meaning of the term "wilfully" as used in §2707 (b) of the Internal Revenue Code of 1939, as amended, and in §7203, Title 26, U.S.C.

The two leading Supreme Court cases which touch on this subject are *United States v. Murdock*, 290 U. S. 389 (1933), and *Spies v. United States*, 317 U. S. 492 (1943). In the *Murdock* case the defendant was convicted of a violation of §1114 (a) of the Revenue Act of 1926, 44 Stat. 116, which provided that:

"Any person required under this Act to pay any tax, as required by law or regulation made under authority thereof to make a return, keep any records, or supply any information, for the purpose of the computation, assessment, or collection of any tax imposed by this Act, who *wilfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, . . ." (Emphasis supplied).

was guilty of a misdemeanor. The similarity of §1114 (a) of the 1926 Act with §2707 (b) of the 1939 Act and §7203 of the 1954 Act is readily apparent. Murdock had refused to answer questions of a revenue agent, after having been duly summoned, on the ground of self-incrimination, claiming that he feared prosecution under state statutes. His conviction was reversed by the Court of Appeals (7th Cir., 62 F. 2d 926), and the Government appealed to the Supreme Court which affirmed the Circuit Court's decision.

The trial judge had refused defendant's request for an instruction that whether the defendant's refusal was based on actual belief and made in good faith should be considered in determining whether his conduct was wilful. The trial judge in his instruction to the jury had stated that the government had proved the "defendant is guilty in manner and form as charged beyond a reasonable doubt."

In its decision the Supreme Court acknowledges that in certain cases such an instruction would not warrant reversal, but went on to say at page 394 that:

"The present, however, is not such a case, unless the word 'wilfully,' used in the sections upon which the indictment was founded, means no more than voluntarily.

"The word often denotes an act which is intentional, or knowing or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose [citations]; without justifiable excuse [citations]; stubbornly, obstinately, perversely [citations]. The word is also employed

to characterize a thing done without ground for believing it is lawful [citations], or conduct marked by a careless disregard whether or not one has the right so to act, [citation].”

The Supreme Court further noted that:

“This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent the loss of taxes, and the act declares a wilful failure to observe the direction a penal offense, an evil motive is a constituent element of the crime.

* * *

“It follows that the respondent (Murdock) was entitled to the charge he requested with respect to his good faith and actual belief.”

The closing comment of the Supreme Court in the *Murdock* case is particularly applicable to the instant case:

“The respondent’s refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.”

On the other hand, in the *Spies* case, *supra*, the defendant had been charged under §145 (b) of the Internal Revenue Code of 1939, as amended, with wilfully attempting to defeat and evade the payment of taxes, a felony. The Court in discussing the distinction between the misdemeanor (§145 (a)) and the felony (§145 (b)) stated at page 497:

“The difference between willful failure to pay a tax when due, which is made a misdemeanor,

and a willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. *Both must be willful*, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock*, 290 U.S. 389. It *may* well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return *might* meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt we could not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.” (Emphasis supplied).

However, the Court rejected its “may” and “might” definitions of wilful, pointing out that §145 (a) made both wilful failure to file a return and wilful failure to pay the tax a misdemeanor. Accordingly, it concluded that the difference between the misdemeanor and the felony does not lie in a difference in the meaning of term “wilful” as used in one and in the meaning of the term “wilful” as used in the other, but rather “is found in the affirmative action implied from the term ‘attempt’, as used in the felony subsection.” *Ergo*, to have wilfulness you must also

have evil motive or bad purpose. The Court noted at page 500 that Spies had claimed he had other “motives”, but the Court held that such inferences are for the jury.

In the instant case the Court by its instruction did not require the jury to find that Appellant had an evil motive or bad purpose to find him guilty of the misdemeanor counts. In fact the Court emphasized that this was necessary by repeatedly drawing a distinction between the felony and misdemeanor counts and instructing that an evil motive and bad purpose must be found to convict Appellant of the felony charges. Much of the testimony which Appellant caused to be printed and which is referred to in the Statement of Facts above reflects that an issue as to the *bona fides* of Appellant's delinquencies should have been submitted to the jury. The books were accurate and available (R. 121-122); the returns were accurate (R. 121, 187); his reasons for not filing and paying on time were due to a shortage of funds (R. 80, 84, 111, 196-197, 210, 211); he believed that payment had to be made at the same time as the return was filed (R. 132-133, 210, 211). It matters not that there may be other evidence which was not printed from which the jury could have inferred that Appellant had the requisite evil motive or bad purpose; the fact is, that an issue of good faith was raised and Appellant was entitled to have it submitted to the jury by appropriate instructions such as Defendant's Requested Instructions quoted above, pp. 16-17. However, the Court's failure to instruct that

evil motive or bad purpose are a required element of the misdemeanors charged resulted in this issue never getting to the jury. It is significant that in connection with the felony counts where "wilfully" was correctly defined by the Court the jury acquitted.

This Court and many others have repeatedly held that "wilfully", as used in tax statutes, declaring certain acts or omissions to be crimes, means with evil motive or bad purpose, and that the failure to give a proper instruction defining the term is reversible error. *Bloch v. United States*, 9th Cir., 1955, 221 F. 2d 786, 789, rehearing den. 223 F. 2d 297 (violation of §145 (b) of the Internal Revenue Code of 1939, as amended); *Forster v. United States*, 9th Cir., 1956, 237 F. 2d 617 (§145 (b)); *United States v. Phillips*, 7th Cir., 1955, 217 F. 2d 435, 442 (§145 (b)); *Wardlaw v. United States*, 5th Cir., 1953, 203 F. 2d 884 (§145 (b)); *United States v. Raub*, 7th Cir., 1949, 177 F. 2d 312 (§145 (b)); *Hargrove v. United States*, 5th Cir., 1933, 67 F. 2d 820, 823 (4 counts, §1114 (a), misdemeanor, and §1114 (b), felony, of the Revenue Act of 1926); *Haigler v. United States*, 10th Cir., 1949, 172 F. 2d 986 (§145 (b)). A few cases, holding that to convict a finding of evil motive or bad purpose is required, are cited: *Legatos v. United States*, 9th Cir., 1955, 222 F. 2d 678 (§145 (b)); *Imholte v. United States*, 8th Cir., 1955, 226 F. 2d 585, 590, 591 (§145 (b)); *Batjes v. United States*, 6th Cir., 1949, 172 F. 2d 1, 4 (§145 (b)); compare *Yarborough v. United States*, 4th Cir., 1956, 230 F. 2d 56, cert. den. 351 U. S. 969 (§2707 (b)).

In *Forster v. United States, supra*, this Court was critical of the fact that the lower Court gave isolated instructions on “wilfulness” during the jury’s deliberation which did not clearly require a finding of evil motive or bad purpose to convict. It is to be noted that this was done in the instant case (R. 287-288, 290-291, 292, 293-294) and that the wording of the isolated instructions on “wilfulness” in both the *Forster* case and the instant case was quite similar.

Another instruction which was given by the District Court (R. 267-268) and which has been found repugnant to a correct presentation of the issue of wilfulness to the jury is the following:

“A person is held to intend all the natural and probable consequences of acts knowingly done or omitted. That is to say the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done or omitted.”

Bloch v. United States, supra; Legatos v. United States, supra, at p. 687; *Wardlaw v. United States, supra* at p. 887. While it is true that the District Court apparently intended this instruction on “presumed intent” to relate only to the felony counts, it is obvious how confusing to the jury and prejudicial to the Appellant the instruction was when considered in the light of the further instruction on intent (R. 269-270) directly following the instruction on “wilfulness” as applied to the misdemeanor counts.

It would appear clear that although the term “wilful” may have different meanings in different contexts that it has a special and technical meaning when used in tax statutes which make certain acts or omissions criminal, to wit: it means that the act is done with evil motive and bad purpose. *Murdock v. United States, supra*. As a matter of statutory construction it is to be assumed that Congress used the term in both felony and misdemeanor Sections with a full realization of its legal meaning as enunciated in the cases cited above. Sutherland, *Statutory Construction*, §4919. It is further to be assumed that Congress did not intend that the same term (“wilfully”) used in two consecutive sections of the same act (Section 7202 and 7203) and dealing generally with same subject matter (tax offenses) should have two different meanings. Further support for this proposition is to be found in *Paddock v. Siemoneit*, Tex., 1953, 218 S. W. 2d 428, 7 A.L.R. 2d 1062, 1071. In that case the Court held that “wilfulness” as used in tax statutes imposing criminal penalties required proof of evil motive or bad purpose, but that “wilfulness” as used in tax statutes imposing civil penalties requires only proof of a deliberate intentional failure to pay taxes when due.

II.

THE COURT ERRED IN GIVING GOVERNMENT'S REQUESTED INSTRUCTION NUMBER 22 TO THE JURY.

Immediately following an instruction that the prior assessment and payment of the taxes due was no

defense (R. 278) the Court instructed the jury as follows:

“The importance of your duties as jurors requires that you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this district that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books.”

Objection was made to the giving of this instruction on the ground that it constituted improper comment rather than being a correct statement of the law (R. 252, 283). This instruction clearly constituted an invasion of the province of the jury and was an invitation, if not a direction, to convict. There can be no question that it was coercive and prejudicial to Appellant and that it was an error. *Billeci v. United States*, U.S.C.A.D.C., 1950, 184 F. 2d 394, 399, 401, 24 A.L.R. 2d 881; *United States v. Link*, 3d Cir., 1952, 202 F. 2d 592.

III.

THE COURT ERRED IN REFUSING TO STRIKE THE WITNESS WALKER'S TESTIMONY.

On its case in chief the Government called Mr. James Walker as a witness. He testified that Appellant was trying to collect a debt which he owed him, and that he told Appellant that he was not in a position to pay, that he was still heavily indebted to

“Uncle Sammy”. He further testified that Appellant replied (R. 176):

“I don’t give a damn for Uncle Sammy. I come first and I will get my money before Uncle Sammy and I have ways of doing it.”

Appellant moved to strike on the grounds it was immaterial and irrelevant (R. 177). When this motion was denied Appellant moved for a mistrial, and this motion was also denied.

It is respectfully submitted that this testimony was completely immaterial and irrelevant to any issue raised in the indictment. An attempt by a creditor to secure payment from his debtor before some other creditor beats him to it has no relationship to the charges of failing to file returns on time or failing to pay taxes when due. Likewise, an expression of disregard for somebody else’s debtor relationship to the United States is not pertinent. On the other hand evidence relating to such disregard of Walker’s debtor relationship to the United States was highly prejudicial.

Immaterial and irrelevant testimony admitted over objection of Appellant and which may have a tendency to mislead the jury and prejudice the other party is sufficient ground for reversal. *Exchange Bank of Wilcox v. Gifford*, Neb., 1918, 167 N.W. 69.

IV.

THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO CERTAIN QUESTIONS ASKED BY THE PROSECUTOR AND IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 54.

Mr. Crumpacker, the prosecutor, asked many questions of Appellant in which it was insinuated that he engaged in unethical and improper business practices (R. 198-206). The prosecutor represented that he was seeking to impeach the defendant, but the Government never offered any evidence to rebut the Appellant's denial of the insinuations contained in the questions. There follow portions of the Record covered by this assignment of error (R. 198-206):

“Q. Now, let me ask you, isn't it true that in your dealings, not only with the Bishop Bank but also with these other people that you dealt with, one of the methods that you were using to make sales was to take, for example a four hundred dollar bedroom set, and tell the customer—say a customer comes in and he says he can't make a down payment, and you say that is all right, we will just mark it up four hundred, fifty dollars and give you credit for fifty dollars down payment and then you discount the paper with the bank at the amount of four hundred dollars, which is exactly the price that your furniture was marked at in the first place. Isn't that the type of practice you were doing?

Mr. Hoddick: Your Honor, we will object to the question as being immaterial and irrelevant to any issue in this case. And it is outside the scope of the direct examination.

The Court. The objection is overruled.

Q. Do you remember Mr. and Mrs. Nicholas Aguinoy? Let me refer you to December of 1954. Do you recall selling a tricycle and two toy autos to Mr. and Mrs. Aguinoy for \$66.75?

Mr. Hoddick. Your Honor, we object to the question as being immaterial and irrelevant to any issue in the case. It is improper and I fail to see what the method of doing business with some of his customers has to do with this case.

The Court. If that is a real ground of your objection, then it is overruled, Mr. Hoddick.

* * *

Q. What do you know was the excise tax item which I believe is shown in the original taxes in your file in connection with the third quarter—the fourth quarter of 1953? I believe there were shown in your books an excise tax item of some \$170.00. What, if you know, did that have to do with it?

Mr. Hoddick. Your Honor, I object to that as being immaterial and irrelevant and outside of the scope of the direct examination. It concerns a withholding [sic*] tax.

The Court. Is this for the purpose of showing a state of mind, Mr. Crumpacker?

Mr. Crumpacker. Yes, your Honor, for impeachment purposes.

The Court. The objection is overruled.

* * *

Q. It is true, Mr. Abdul, that you received numerous complaints about the method of advertising that you used at Home Furniture Company?

*Should be "excise".

Mr. Hoddick. I am going to object to that as immaterial and irrelevant.

The Court. The objection is overruled.

* * *

Q. It is true, is it not, that you made use of matter which came from nationally advertised goods, blocking out the nationally advertised names, and using those to advertise goods of an inferior quality?

Mr. Hoddick. We renew our objection as irrelevant and immaterial.

The Court. The objection is overruled."

There are other questions of a similar vein interspersed among the questions quoted above to which no objections were made since inquiry into the collateral and unrelated matters covered by them had already been sanctioned by the Court. No evidence was ever offered by the Government to rebut the answers given by Appellant to this line of questions.

Again, in an attempt to prevent a beclouding of the issues by these collateral matters Appellant requested that the following instruction (R. 20, No. 54) be given:

"You are hereby instructed that all testimony relative to merchandising and advertising techniques of the Defendant and that all testimony relative to specific sales by Home Furniture Company, Limited, is irrelevant and shall be disregarded by you."

This requested instruction was refused (R. 227).

It is submitted that there can be no question that the questions complained of in this assignment re-

lated to collateral matters which were not a proper subject of inquiry and that the implications or insinuations contained in the questions were prejudicial to Appellant. This Court has held that this technique of prosecuting a criminal case is error. *Herzog v. United States*, 9th Cir., 1955, 226 F. 2d 561, opinion adhered to 235 F. 2d 664, cert. den. 352 U.S. 844; *Bloch v. United States*, 9th Cir., 1955, 221 F. 2d 786, 790, rehearing den. 223 F. 2d 297; *Wigmore on Evidence*, 3d ed., §§781, 983 and 1808.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment appealed from herein should be reversed.

Dated, Honolulu, T. H.,
October 12, 1957.

HOWARD K. HODDICK,
Attorney for Appellant.

No. 15523

United States
Court of Appeals
for the Ninth Circuit

DANIEL L. ABDUL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii.

FILE

AUG - 9 1957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorney, Department of Justice,
Washington 25, D. C.;

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii, by

EDGAR D. CRUMPACKER, ESQ.,
Assistant U. S. Attorney,
P.O. Box 654,
Honolulu, Hawaii.

For the Defendant, Daniel L. Abdul:

HOWARD K. HODDICK, ESQ., and
ALLEN R. HAWKINS, ESQ.,
320 Damon Building,
Honolulu, Hawaii, and

NATHANIEL FELZER, ESQ.,
268 Alexander Young Building,
Honolulu, Hawaii.

In the United States District Court
for the District of Hawaii

Cr. No. 11,072

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL L. ABDUL,

Defendant.

(Secs. 2707(b), 2707(c), IRC 1939), (Secs. 7202,
7203, IRC 1954), (26 USC, Secs. 2707(b), 2707
(c), 7202 and 7203)

INDICTMENT

Count I.

The Grand Jury Charges:

That during the period from October 1, 1953, to December 31, 1953, inclusive, Daniel L. Abdul was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal

Income Taxes and Federal Insurance Contributions Act Taxes in the sum of \$2,987.58; that by reason of such facts the said Daniel L. Abdul was required after December 31, 1953, and on or before January 31, 1954, to file with the Director of Internal Revenue for the District of Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii, an Employers' Quarterly Federal Tax Return; and that said Daniel L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employers' Quarterly Federal Tax Return, in violation of § 2707(b), Internal Revenue Code of 1939, 26 United States Code, § 2707(b).

Count II.

The Grand Jury Further Charges:

That on or about the 31st day of January, 1954, in the District of Hawaii, Daniel L. Abdul, the identical person named in Count I of this Indictment, who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 4th quarter of the year 1953 ending December 31, 1953, deducted and col-

lected from the total taxable wages of the employees of said corporation such taxes in the sum of \$2,987.58, did wilfully fail to truthfully account for and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper officer of the United States, said Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages due and owing to the United States of America for said quarter ending December 31, 1953, in violation of § 2707(c), Internal Revenue Code of 1939, 26 United States Code, § 2707(c).

Count III.

The Grand Jury Further Charges:

That during the period from January 1, 1954, to March 31, 1954, inclusive, Daniel L. Abdul, the identical person named in Counts I and II of this Indictment, was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal Income Taxes and Federal Insurance Contributions Act Taxes in the sum of \$2,095.81; that by reason of such facts the said Daniel L.

Abdul was required after March 31, 1954, and on or before April 30, 1954, to file with the Director of Internal Revenue for the District of Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii, an Employers' Quarterly Federal Tax Return; and that said Daniel L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employers' Quarterly Federal Tax Return; in violation of § 2707(b), Internal Revenue Code of 1939, 26 United States Code, § 2707(b).

Count IV.

The Grand Jury Further Charges:

That on or about the 30th day of April, 1954, in the District of Hawaii, Daniel L. Abdul, the identical person named in Counts I, II and III of this Indictment, who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 1st quarter of the year 1954 ending March 31, 1954, deducted and collected from the total taxable wages of the employees of said corporation such taxes in the sum of \$2,095.81, did wilfully fail to truthfully account for

and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper officer of the United States, said Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages due and owing to the United States of America for said quarter ending March 31, 1954, in violation of § 2707(c), Internal Revenue Code of 1939, 26 United States Code, § 2707(c).

Count V.

The Grand Jury Further Charges :

That during the period from April 1, 1954, to June 30, 1954, inclusive, Daniel L. Abdul, the identical person named in Counts I, II, III and IV of this Indictment, was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal Income Taxes and Federal Insurance Contributions Act Taxes in the sum of \$1,794.36; that by reason of such facts the said Daniel L. Abdul was required after June 30, 1954, and on or before July 31, 1954, to file with the Director of Internal Revenue for the District of

Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii, an Employers' Quarterly Federal Tax Return; and that said Daniel L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employers' Quarterly Federal Tax Return; in violation of § 2707(b), Internal Revenue Code of 1939, 26 United States Code, § 2707(b).

VI.

The Grand Jury Further Charges:

That on or about the 31st day of July, 1954, in the District of Hawaii, Daniel L. Abdul, the identical person named in Counts I, II, III, IV and V of this Indictment, who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 2nd quarter of the year 1954 ending June 30, 1954, deducted and collected from the total taxable wages of the employees of said corporation such taxes in the sum of \$1,794.36, did wilfully fail to truthfully account for and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper

officer of the United States, said Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages due and owing to the United States of America for said quarter ending June 30, 1954, in violation of § 2707(c), Internal Revenue Code of 1939, 26 United States Code, § 2707(c).

Count VII.

The Grand Jury Further Charges:

That during the period from July 1, 1954, to September 30, 1954, inclusive, Daniel L. Abdul, the identical person named in Counts I, II, III, IV, V and VI of this Indictment, was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal Income Taxes and Federal Insurance Contributions Act Taxes in the sum of \$1,796.85; that by reason of such facts the said Daniel L. Abdul was required after September 30, 1954, and on or before October 31, 1954, to file with the Director of Internal Revenue for the District of Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the

District of Hawaii, an Employers' Quarterly Federal Tax Return; and that said Daniel L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employers' Quarterly Federal Tax Return; in violation of § 7203, Internal Revenue Code of 1954, 26 United States Code, § 7203.

Count VIII.

The Grand Jury Further Charges:

That on or about the 31st day of October, 1954, in the District of Hawaii, Daniel L. Abdul, the identical person named in Counts I, II, III, IV, V, VI and VII of this Indictment, who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 3rd quarter of the year 1954 ending September 30, 1954, deducted and collected from the total taxable wages of the employees of said corporation such taxes in the sum of \$1,796.85, did wilfully fail to truthfully account for and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper officer of the United States, said Federal Insurance Contributions Act

Taxes and Federal Income Taxes withheld from wages due and owing to the United States of America, for said quarter ending September 30, 1954, in violation of § 7202, Internal Revenue Code of 1954, 26 United States Code, § 7202.

Count IX.

The Grand Jury Further Charges:

That during the period from January 1, 1955, to March 31, 1955, inclusive, Daniel L. Abdul, the identical person named in Counts I, II, III, IV, V, VI, VII and VIII of this Indictment, was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal Income Taxes and Federal Insurance Contributions Act Taxes in the sum of \$1,601.69; that by reason of such facts the said Daniel L. Abdul was required after March 31, 1955, and on or before April 30, 1955, to file with the Director of Internal Revenue for the District of Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii, an Employers' Quarterly Fed-

eral Tax Return; and that said Daniel L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employers' Quarterly Federal Tax Return; in violation of § 7203, Internal Revenue Code of 1954, 26 United States Code, § 7203.

Count X.

The Grand Jury Further Charges:

That on or about the 30th day of April, 1955, in the District of Hawaii, Daniel L. Abdul, the identical person named in Counts I, II, III, IV, V, VI, VII, VIII and IX of this Indictment, who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 1st quarter of the year 1955 ending March 31, 1955, deducted and collected from the total taxable wages of the employees of said corporation such taxes in the sum of \$1,601.69, did wilfully fail to truthfully account for and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper officer of the United States, said Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages due

and owing to the United States of America for said quarter ending March 31, 1955, in violation of § 7202, Internal Revenue Code of 1954, 26 United States Code, § 7202.

Count XI.

The Grand Jury Further Charges:

That during the period from April 1, 1955, to June 30, 1955, inclusive, Daniel L. Abdul, the identical person named in Counts I, II, III, IV, V, VI, VII, VIII, IX and X of this Indictment, was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal Income Taxes and Federal Insurance Contributions Act Taxes in the sum of \$1,380.87; that by reason of such facts the said Daniel L. Abdul was required after June 30, 1955, and on or before July 31, 1955, to file with the Director of Internal Revenue for the District of Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii an Employers' Quarterly Federal Tax Return; and that said Daniel

L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employers' Quarterly Federal Tax Return; in violation of §7203, Internal Revenue Code of 1954, 26 United States Code, §7203.

Count XII.

The Grand Jury Further Charges :

That on or about the 31st day of July 1955, in the District of Hawaii, Daniel L. Abdul who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 2nd quarter of the year 1955, ending June 30, 1955, deducted and collected from the total taxable wages of the employees of said corporation such taxes in the sum of \$1,380.87, did wilfully fail to truthfully account for and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper officer of the United States, said Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages due and owing to the United States of America for said quarter ending June 30, 1955, in vio-

lation of §7202, Internal Revenue Code of 1954, 26 United States Code, §7202.

Dated: Honolulu, T. H., this 16 day of August, 1956.

A True Bill

/s/ W. E. SHEEHAN,

Foreman, Grand Jury;

/s/ E. D. CRUMPACKER,

Asst. United States Attorney.

[Endorsed]: Filed August 16, 1956.

[Title of District Court and Clause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

No. 27

You are instructed that there is no law of the United States which requires a taxpayer to answer any question of an Internal Revenue Service agent.

Refused.

[Initialed] J. W.

No. 28

You are instructed that no taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year

unless the taxpayer requests otherwise or unless the Secretary or his delegate after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Section 7605 (b) USCA.

Refused.

[Initialed] J. W.

No. 29

You are instructed that Mr. Abdul committed no offense by his failure to reply to a question asked by an agent or employee of the Internal Revenue Service; nor did he commit any offense by his failure to furnish any such agent or employee with any books or records that may have been asked for, and you are not to draw any inference adverse to the defendant from any such failure.

Refused.

[Initialed] J. W.

No. 30

The failure of Mr. Adbul to furnish an agent of the government with any books, records or other information does not constitute evidence of wilfulness.

Refused.

[Initialed] J. W.

No. 37

You are instructed that before you can find the Defendant guilty of the charges contained in the indictment, you must first find, from the evidence, that he was wilful. The wilfulness required in a criminal action must be established by evidence that shows affirmative or positive acts on the part of the Defendant, that, in and of themselves, spell out, specifically, bad purpose or evil motive. If you do not find such specific acts in the evidence, then you must return a verdict of "Not Guilty."

Covered—refused.

[Initialed] J. W.

No. 38

If you find that the filing of the returns and the payment of the taxes due were not delayed by Mr. Abdul with any bad purpose or evil motive on his part, then you must find him "Not Guilty."

Refused—Covered.

[Initialed] J. W.

No. 40

If you find from the evidence that the Defendant did make all tax returns required of him, even though paid late, that he did keep accurate records; that he supplied the government agents with information requested even if delayed at times; that he did eventually pay the taxes due and that he truthfully accounted for his tax liability, then the

Defendant cannot have acted with bad purpose or evil motive, and if you so find from the evidence, then you must return a verdict of "Not Guilty."

Refused.

[Initialed] J. W.

No. 41

If you should find from the evidence that the defendant may have been impolite, crude, abrupt, trying or even irritating to any one or even all of the Internal Revenue Service employees and agents, none of these are evidence of bad purpose or of evil motive or of wilfulness on the part of the defendant.

Refused.

[Initialed] J. W.

No. 42

If you find that it was the intention of Mr. Abdul to pay the taxes due when sufficient funds were available, then you must find him "Not Guilty" of each and every count of the indictment.

Refused.

[Initialed] J. W.

No. 44

The question of wilfulness is a matter for you as jurors to determine. Now wilfulness is a state of mind, and it is not possible to look into a man's mind to see what went on. The only way that you have of arriving at the wilfulness of the defendant

in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from such facts and circumstances whether the defendant acted with criminal wilfulness at the time in question.

Covered—refused.

[Initialed] J. W.

No. 45

If you find from the evidence that the Defendant did disclose his true tax liability, then this is evidence that the necessary criminal wilfulness on his part was not present, and you must find him not guilty.

Refused.

[Initialed] J. W.

No. 46

Before you can find the Defendant guilty of wilfulness you must be certain that the evidence shows specific intent, that is, you must be able to point to the specific acts which constitute the acts of wilfulness; if you cannot do so, then you must find the Defendant "Not Guilty."

Covered—refused.

[Initialed] J. W.

No. 48

You are instructed to disregard all of the testimony of the witness, James or Jimmy Walker.

Refused.

[Initialed] J. W.

No. 54

You are hereby instructed that all testimony relative to the merchandising and advertising techniques of the Defendant and that all testimony relative to specific sales by Home Furniture Company, Limited, is irrelevant and shall be disregarded by you.

Refused.

[Initialed] J. W.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

No. 7

You will note that Counts I, III, V, VII, IX, and charge the defendant with wilfully and knowingly failing to make quarterly Federal tax returns to the District Director, and Counts, II, IV, VI, VIII, X, and XII charge the Defendant with wilfully failing to truthfully account for and pay over to the Director the taxes for which such returns were required to be filed. The types of wilfulness involved in these two different charges are separate and dis-

tinct and I ask you to pay particular attention to me when I describe to you just what is meant in each instance: [Read 3.]

The word "wilful," as used in Counts I, III, V, VII, IX, and XI, that is, in failing to make a tax return, means with a bad purpose or without ground for believing that one's act is lawful, or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act.

The word "wilful," as used in Counts II, IV, VI, VIII, X, and XII, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due, and with intent to defraud the government of that tax by any affirmative conduct, ~~the likely effect of which would be to mislead or to conceal~~. [Further, with respect to these counts "wilfulness" implies bad faith and an evil motive.]¹

With these two standards in mind, I further instruct you that the question of intent is a matter for you as jurors to determine, and as intent is a state of mind, and it is not possible to look into a man's mind to see what went on, the only way that you have of arriving at the intent of the Defendant in this case is for you to take into consideration all the facts and circumstances shown by the evidence, including the Exhibits, and determine from all such facts and circumstances what the intent of the De-

¹[Material in brackets appeared as an alteration in the original copy.]

fendant was at the time in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

Given as modified for objection?

[Initialed] J. W.

No. 8

On the question of the intent involved in the alleged commission of the offenses charged in the Indictment, there are certain matters which you may consider as pointing to such intent on the part of the Defendant if you find that they exist in this case. These are general illustrations: His statements to others reflecting his attitude toward his tax obligations, failure to file the necessary returns, concealment of facts, false and contradictory statements on material matters to the officers of the Bureau of Internal Revenue during the course of the interview, suppression of evidence and failure to make books available to Internal Revenue Agents when requested, evasiveness when interviewed, inconsistent and contradictory statements and explanations made on the stand, showing book entries to inquiring agents which do not properly or fairly reflect the payment of taxes, filing of annual summaries of taxes withheld which misrepresent that

taxes have been paid and/or taking credit for such unpaid taxes on his personal income tax return, representations that no moneys were available to pay the taxes when due if such representations are unreasonable to you, failure to notify internal Revenue Agents of disposition of assets of the corporation to others, use of currently available assets of the corporation for other purposes including loans and advances to the Defendant, the payment of salary to Defendant's wife for unsubstantial services to the corporation, and the payment of obligations of the corporation other than Federal Taxes at a time or times when such taxes were required to be held in trust for the United States and/or paid over to the District Director of Internal Revenue, and any conduct, the likely effect of which would be to mislead or to conceal. I give you these instances simply to illustrate the type of conduct from which you may infer the intent required in the wilful failure to file returns and the wilful failure to truthfully account for and pay over taxes withheld. And if you find that the tax evasion motive plays any part in such conduct, the offenses of wilful failure to truthfully account for and pay over taxes withheld as charged in Counts II, IV, VI, VIII, X, and XII may be made out even though the conduct I have mentioned might also serve some other purpose.

Refused.

[Initialed] J. W.

No. 10

As I have mentioned to you, taxes withheld are required to be held in a special fund in trust for the United States. Thus, if you find that the Defendant has represented to you the defense of inability to pay, you may consider that as evidence of his wilfulness in failing to pay the taxes insofar as it indicates to you his acknowledgment of the dissipation of the trust fund and the breach of trust. On the other hand, if you find that there was money available to pay the taxes and that the taxes were in fact ultimately collected, you may consider that in determining whether his defense of inability to pay is a defense of any substance.

Refused.

[Initialed] J. W.

No. 11

Every employer required to withhold and pay Income Taxes and every employer liable for Federal Insurance Contribution Act Taxes is required to keep detailed and accurate payroll records at a convenient and safe location accessible to Internal Revenue officers, and open for inspection at all times by such officers.

~~Any failure on the part of the Defendant to supply any information for the purposes of the computation, assessment, or collection of the taxes of Home Furniture Company, Ltd., involved in this case, which you find to be unjustified or inexcusable,~~

~~is a circumstance which may be considered in your determination of his guilt or innocence.~~

As modified. No objection.

[Initialed] J. W.

No. 18

Prior investigation to determine civil liability in order that the Government may assess and collect the taxes before the collection is jeopardized in any way does not preclude the Government from instituting further investigation and ultimately bringing criminal charges in connection with the same tax delinquencies.

Given.

[Initialed] J. W.

No. 22

The importance of your duties as jurors requires that you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this District that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books.

Given. No objection.

[Initialed] J. W.

[Title of District Court and Cause.]

COMMUNICATIONS BETWEEN COURT
AND JURY

May we have a copy of your instructions for examination? If not, will you please read your instructions to us once more?

Thank you,

/s/ JAMES C. ZAVE,
Foreman.

Your Honor:

A few members of the jury would like to have you read over the instructions again as to the word "wilful" pertaining to Counts 2, 4, 6, 8, 10 and 12.

Thank you,

/s/ JAMES C. ZAVE,
Foreman.

Opened at 8:25 and message given to Judge Wiig over phone.

T.P.C.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Daniel L. Abdul

As to Count I—Guilty.

As to Count II—Not Guilty.
As to Count III—Guilty.
As to Count IV—Not Guilty.
As to Count V—Guilty.
As to Count VI—Not Guilty.
As to Count VII—Guilty.
As to Count VIII—Not Guilty.
As to Count IX—Guilty.
As to Count X—Not Guilty.
As to Count XI—Guilty.
As to Count XII—Not Guilty.

as charged in the Indictment herein.

Dated: Honolulu, T. H., this 5th day of December,
1956.

/s/ JAMES C. ZAVE,
Foreman.

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The Defendant moves the Court to grant him a new trial for the following reasons:

(1) The Court erred in denying Defendant's motion for acquittal made at the conclusion of the government's case.

(2) The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

(3) The verdict is contrary to the weight of the evidence.

(4) The verdict is not supported by the evidence.

(5) The Court erred in overruling the objections to the introduction of evidence relating to governmental procedures as testified by Mr. Mew.

(6) The Court erred in overruling the objection to the introduction into evidence of the testimony of James or Jimmy Walker and in denying defendant's motion to strike all of the testimony of James or Jimmy Walker.

(7) The Court erred in refusing to give Defendant's requested instruction No. 48 regarding the testimony of Mr. Walker.

(8) The Court erred in not also giving Defendant's requested instruction No. 35 on the two occasions when the jury requested and they were instructed again on the subject of wilfulness.

(9) The Court erred to the substantial prejudice of the Defendant, by carrying on an extensive examination of government witnesses.

(10) The Court erred in allowing the introduction into evidence of income tax returns both of the corporation and of the Defendant personally for the years 1953, 1954 and 1955, and of the testimony relating thereto as this had no relevancy to the charges of the indictment.

(11) The Court erred in drawing a distinction for the jury in the instructions between the meaning of wilfulness as it pertained to the even numbered counts and as it pertained to the odd numbered counts of the indictment.

(12) The Court erred in instructing the jury as to the meaning of wilfulness as it pertained to the odd numbered or misdemeanor counts.

(13) The Court erred in admitting into evidence the testimony of Messrs. Filene and Stratton and Miss Burns relative to statements made to them by the defendant to the effect that he had mailed the returns or paid the taxes.

(14) The Court erred in allowing the Government to question the defendant concerning numerous business transactions such as collections of accounts receivable, preparation and signing of conditional sales contracts, advertising of merchandise, and others which were not relevant to the issues framed in the indictment.

Dated at Honolulu, T. H., this 14th day of December, 1956.

NATHANIEL FELZER,
HOWARD K. HODDICK and
ALLEN R. HAWKINS,

By /s/ NATHANIEL FELZER,
Attorneys for Defendant.

[Endorsed]: Filed December 14, 1956.

District Court of the United States
for the District of Hawaii

No. 11,072

UNITED STATES OF AMERICA,

vs.

DANIEL L. ABDUL.

JUDGMENT AND COMMITMENT

On this 11th day of January, 1957, came the attorney for the government and the defendant appeared in person and by counsel, Nathaniel Felzer, Esq.; Howard K. Hoddick, Esq.; and Allen R. Hawkins, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty as to Counts I, III, V, VII, IX and XI of the offense of wilfully and knowingly failing to file Employers' Quarterly Federal Tax Returns for taxes withheld from wages of employees, well knowing his duty and obligation to make such returns, in violation of 2707(b), Internal Revenue Code of 1939, 26 USC, § 2707(b); and 7203, Internal Revenue Code of 1954, 26 USC, § 7203, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year as to Count I; One (1) Year as to Count V; One (1) Year as to Count IX. Sentence as to Counts I, V and IX is to run concurrently.

Six (6) Months as to Count III; Six (6) Months as to Count VII; Six (6) Months as to Count XI. Sentence as to Counts III, VII and XI is to run concurrently with each other and consecutively with the sentence imposed as to Counts I, V and IX.

Further, It Is Adjudged the payment of costs on any one Count will satisfy the assessment of costs on the other Counts.

Mittimus is stayed until 12:00 o'clock noon, Monday, January 14, 1957.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,

United States District Judge.

[Endorsed]: Entered January 14, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Daniel L. Abdul,
140 Niuiki Circle, Honolulu, T. H.

Names and Addresses of Appellant's Attorneys:
Nathaniel Felzer, 268 Alexander Young Building,
Honolulu, T. H.; Howard K. Hoddick and
Allen R. Hawkins, 320 Damon Building, Honolulu,
T. H.

Offenses:

The Appellant was charged in Counts I, III and V of the Indictment filed August 16, 1956, with violating Section 2707(b) of the Internal Revenue Code of 1939 in that he wilfully and knowingly failed to make to the District Director of Internal Revenue for the District of Hawaii the required Employers' Quarterly Federal Tax Returns for the last quarter of 1953, the second quarter of 1954 and the second quarter of 1955, respectively.

The Appellant was also charged in Counts VII, IX and XI in violation of Section 7203, Internal Revenue Code of 1954 of the same indictment with having wilfully and knowingly failed to make to the District Director of Internal Revenue for the District of Hawaii the required Employers' Quarterly Federal Tax Returns for the third quarter of 1954, the first quarter of 1955 and the second quarter of 1955, respectively.

On December 5, 1956, the jury returned a verdict of guilty against the defendant as to each of the aforesaid offenses.

Statement of Judgment or Order, Giving Date, and
Any Sentence:

On January 11, 1957, a final judgment of conviction of the aforesaid offenses was entered by which the defendant was sentenced to confinement for a period of one year each as to Counts I, V and IX and for a period of six months each as to Counts III, VII and XI, the sentences of one year to be served concurrently and the sentence of six months to be served concurrently with each other but consecutively to said sentences of one year and the defendant was further ordered to pay the cost of prosecution.

The above-named appellant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated at Honolulu, T. H., this 14th day of January, 1957.

NATHANIEL FELZER,
HOWARD K. HODDICK and
ALLEN R. HAWKINS,

By /s/ HOWARD K. HODDICK,
Attorneys for Appellant.

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents:

That We, Daniel L. Abdul, as Principal, and Daniel L. Abdul and Katherine Y. Abdul, as Sureties, are held and firmly bound unto the United States of America in the full sum of \$5,000.00 for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately, in the District Court for the United States in and for the District and Territory of Hawaii, judgment, sentence and fine were made and entered against Daniel L. Abdul, defendant above named, and

Whereas, notice has been given of appeal to the United States Court of Appeals for the Ninth Judicial Circuit, to secure a reversal of said judgment, sentence and fine, and

Whereas, the Honorable Jon Wiig, Judge of said District Court, did regularly order that a supersedeas and bail bond be given in the sum of \$5,000.00 pending said appeal.

Now, Therefore, the condition of the above obligation is such that if the said Daniel L. Abdul shall appear here in person or by attorney in the United States Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and

prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the Judgment of said District Court against him, and shall surrender himself in execution of the Judgment, Sentence and Fine appealed from as said Circuit Court may direct, if the Judgment, Sentence and Fine against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the Judgment, Sentence and Fine made against him shall be reversed by said Circuit Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above-bounded Principal and Sureties have hereunto affixed their hands this 14th day of January, 1957.

/s/ DANIEL L. ABDUL,
Principal;

/s/ DANIEL L. ABDUL,

/s/ KATHERINE Y. ABDUL,
Sureties.

Taken and acknowledged before me this 14th day of January, 1957.

[Seal] /s/ KURT F. THOMPSON, JR.,
Clerk, U. S. District Court.

NOTICE OF LIEN

Notice Is Hereby Given that Daniel L. Abdul and Katherine Y. Abdul, husband and wife, whose residence and post office address is 140 Niuiki Circle, Honolulu, City and County of Honolulu, Territory of Hawaii, owners of the following lease, to wit:

That certain Lease dated November 17, 1953, made by and between Cooke Trust Company, Limited, Trustee under Indenture of Trust executed by Mary Lucas Pflueger and Harriet Lucas Cassidy under date of June 16, 1952, and Cooke Trust Company, Limited, Attorney-in-Fact for Niu Development Corporation, Limited, as Lessor and Daniel L. Abdul and Katherine Y. Abdul, as Lessees, and recorded in the Bureau of Conveyances of the Territory of Hawaii in Liber 2761 on Pages 146-153, said lease dismissing all those certain premises situated in Niu, Honolulu, City and County of Honolulu, Territory of Hawaii, being a portion of R. P. 52, L.C. Aw. 802 to Alexander Adams and being also a portion of the Old Niu Fish Pond, more particularly described in Exhibit B, attached to said Lease and by reference made a part thereof.

Subject, However, to that certain mortgage made by said Katherine Y. Abdul and Daniel L. Abdul to the American Security Bank, do hereby state that they are the sureties on a supersedeas bond pending appeal in the amount of \$5,000.00 posted in the United States District Court for the District of Hawaii, in United States of America v. Daniel L.

Abdul, Criminal No. 11,037, and that there is a lien upon the aforesaid property in favor of the United States of America until said supersedeas bond pending appeal is discharged by order of Court.

Dated at Honolulu, T. H., this 14th day of January, 1957.

/s/ DANIEL L. ABDUL,

/s/ KATHERINE Y. ABDUL.

Duly verified.

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DESIGNATING APPEAL

On application of the Defendant, above named, made pursuant to the provisions of Rule 39c of the Federal Rules of Criminal Procedure,

It Is Hereby Ordered that the Defendant may have up to and including the 15th day of April, 1957, within which to file the record on appeal and to docket the appeal.

Dated at Honolulu, T. H., this 21st day of February, 1957.

/s/ J. FRANK McLAUGHLIN,

Judge of the Above-Entitled
Court.

[Endorsed]: Filed February 21, 1957.

In the United States District Court
for the District of Hawaii

Criminal No. 11,072

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL L. ABDUL,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Held in the U. S. District Court, Honolulu, T. H.,
commencing on November 26, 1956, at 10:00 a.m.

Before Hon. Jon Wiig, Judge, and a Jury.

Appearances:

E. D. CRUMPACKER, ESQ.,
Assistant U. S. Attorney,
Appearing for the Plaintiff.

HON. ALLEN R. HAWKINS,
HOWARD K. HODDICK, ESQ., and
NATHANIEL FELZER, ESQ.,
Appearing for the Defendant.

* * *

HOWARD H. K. MEW

a witness on behalf of the Plaintiff being duly sworn, testified as follows: [22*]

* * *

Q. Let me ask you this: Could it have come from any other file? A. No, sir.

Q. Is that same true with any other exhibit?

The Court: Let's not go afield, now, Mr. Crumpacker. It makes it exceedingly difficult. If you want to lay your foundation for No. 1 and then offer it, then the Court will hear the objections and rule on them. Because there is some difference in each of these exhibits. And offering them en masse can cause difficulty.

Mr. Crumpacker: Yes, sir. I will reoffer No. 1.

Mr. Hoddick: May I ask some questions of the witness, your Honor?

The Court: Yes. [108]

Voir Dire Examination

By Mr. Hoddick:

* * *

Q. (By Mr. Hoddick): I call your attention to the pencil notation across No. 1 for identification and ask you if you made it?

A. I did not make it. I know the person who made it.

Q. How do you know? A. By the writing.

The Court: By what? [111]

The Witness: By her writing.

(Testimony of Howard H. K. Mew.)

Q. (By Mr. Hoddick): And who do you believe that person to be? A. Mrs. Dolly Jordan.

Q. Dolly Jordan? A. That's correct.

Q. Do her initials appear anywhere on this return?

A. Her initials do not appear on this return.

Q. And does she work in your section?

A. She is the chief of the file section.

Q. You would not know when she put this on, if she did it? A. No.

Q. I also notice that there is a pencil circle around the one and a half per cent in line 6. Do you know when, where or how that got on there?

A. I have no idea.

Q. Mr. Mew, are you familiar with Mr. Abdul's signature, the defendant in this case?

A. I have never seen it before.

Q. Do you know whether that in fact is his signature on that return?

A. No; I know that is his name.

Q. It is signed Daniel Abdul?

A. That is correct.

Mr. Hoddick: We renew our objection as to the foundation. [112] Also Plaintiff's Exhibit No. 1 is outside of the period of the indictment and we object on the ground that it is immaterial and irrelevant.

The Court: Mr. Crumpacker, isn't the official custodian of these records available?

Mr. Crumpacker: I understood the witness to testify that they were from his files.

(Testimony of Howard H. K. Mew.)

The Court: Well, that was his first testimony. Then later on he testified that they were in the custody of someone else. He did not bring them to court from his files. My question is, do you know whether the official custodian of the records is available?

Mr. Crumpacker: May I ask the witness a question in that regard?

The Court: I will ask him. Who had official custody of these records after they left your office, so far as you know?

The Witness: After they left my office?

The Court: Yes. Of that record there.

The Witness: You mean after it was withdrawn from the file?

The Court: That's right.

The Witness: I have no idea after it had been withdrawn from the file, I have no idea.

The Court: After it left your division, where did it [113] go?

The Witness: To the file section.

The Court: To the file section?

The Witness: That's right.

The Court: And where is the file section located?

The Witness: In room 201, second floor of this building.

The Court: And who is in charge of that?

The Witness: Mrs. Dolly Jordan.

The Court: And under your normal operating procedure, would she be the custodian of that record?

(Testimony of Howard H. K. Mew.)

The Witness: Yes. Of course, she is under the chief of the returns processing branch.

The Court: She is under your direction?

The Witness: That is correct, sir.

The Court: So that you are directly responsible for the custody of that record, is that correct?

The Witness: Yes, sir.

The Court: The objection is overruled. It will be received as Exhibit 1.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 1.)

The Court: Ladies and gentlemen of the jury, you will be excused for a ten-minute recess.

(A recess was taken at 11:03 a.m.) [114]

After Recess

The Court: The record will show that the jury is present, the defendant and his counsel.

Mr. Crumpacker: On the basis of the witness' testimony just before recess, your Honor, I would like to reoffer Exhibit No. 2 and the others.

The Court: If it only takes a minute to go down the line, Mr. Crumpacker, on the individual objections from Mr. Hoddick, let us proceed that way because I cannot rule properly until I know what the specific objections are. You are offering No. 2 now?

Mr. Crumpacker: Yes, your Honor.

The Court: Mr. Hoddick?

(Testimony of Howard H. K. Mew.)

Mr. Hoddick: And I once again ask that I be permitted to ask a few questions on voir dire.

The Court: Yes. But I want to ask one question first. As to Exhibit No. 2 for identification, Mr. Mew, are you the official custodian of that record?

The Witness: As acting chief of the returns processing branch, yes.

Voir Dire Examination

By Mr. Hoddick:

Q. Mr. Mew, on Exhibit 2 for identification there appears in ink at the top of the return the words, "Dup Report." Do you see those? (Showing document to the witness.) [115] A. Yes.

Q. Do you know who put them on there?

A. No, sir.

Q. There also appears in red pencil under the column headed, "Return for Calendar Quarter," the letters 1984. Do you know when they were put on there, the numbers 1984?

A. That was put on there when the return was filed. Put on there by Mrs. Fujii. She checked the return off our master list.

Q. You assume that it was put on there by Mrs. Fujii? You did not see her do it?

A. I did not see her do it.

Q. That is the office?

A. That is the office procedure. When the return comes in, why, the master list number—she would put it on—

(Testimony of Howard H. K. Mew.)

The Court: Just a moment. Mrs. Courtney cannot hear you. And, Mr. Hoddick, I notice when you approach the witness closely sometimes your voice drops.

Mr. Hoddick: I will try to keep it up, your Honor.

The Court: Very well.

Q. (By Mr. Hoddick): Mr. Mew, in line 6 there have been changes made in ink in the printed percentage numbers that appear on that line. Do you know who or when they were made and by whom they were made or when?

A. I have no idea who made it and when it was made. [116]

Q. There also appears in ink in item 10 the numbers 9-6043. Do you know who put those there or when they were put there?

A. That was put there by one of the clerks in the computation, verification and matching section. This represents the account number assigned the tax return.

Q. Again, you did not do that yourself?

A. No, sir.

Q. Nor did you see it done? A. No, sir.

Q. You assume that it was done by a clerk in that section?

A. That is the office procedure in assigning numbers to returns received in the office.

Q. It is not your office procedure? It is the procedure of the cashier's office, isn't it?

A. It is the function of the computation, veri-

(Testimony of Howard H. K. Mew.)

fication and matching section to assign tax returns received without remittance.

Q. A tax return which is received without remittance is not sent through the cashier's office?

A. It is received in the cashier's office. From there it comes to the returns processing branch.

Q. Well, isn't it the cashier's office that stamps this serial number on each return as it comes in?

A. The cashier's branch assigns a number on the tax return if the remittance accompanies the return. If no remittance accompanies the return, then the returns processing branch assigns an account number on the tax return.

Q. And that is what you assume happened in this case?

A. That's correct, sir.

Q. And again I ask you, are you familiar with the signature of the defendant, Daniel Abdul?

The Court: He has already testified that he doesn't know.

Q. You do not know whether the signature which appears on this return is that of the defendant or not, do you?

A. I do not know whether he signed it but I am able to read this name, Daniel Abdul.

Q. It says Daniel Abdul——

Mr. Hoddick: Your Honor, we renew our objection that the receipt of this exhibit——

The Court: Well, instead of renewing it, will you state the grounds of your objection?

Mr. Hoddick: No adequate foundation has been laid for its admission in evidence, based both on

(Testimony of Howard H. K. Mew.)

the fact that he did not have direct custody of it, though he has the final responsibility, and we don't know where it has been since it left his office. And if it is going to be received, there is material on here on which there has been no proper foundation laid. This [118] "Dup Report" which appears on the top of it, we don't know how it got there. And we don't know where the original is. That indicates it is a copy.

The Court: The objection is overruled. The document will be received as Exhibit 2.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 2.)

Mr. Crumpacker: May I reoffer Exhibit No. 3 for identification?

The Court: What is No. 3?

Mr. Crumpacker: That is the W-3 form for 1953.

The Court: Mr. Mew, are you the official custodian of that record?

The Witness: I am, sir.

The Court: Will you state your objection?

Mr. Hoddick: Your Honor, we object on the grounds of lack of proper foundation, and specifically call your Honor's attention to one thing, to the tape which is attached to this exhibit. The witness had no knowledge of where it came from and who made it. And we further object on the ground that this exhibit is immaterial and irrelevant to the charges contained in this indictment.

(Testimony of Howard H. K. Mew.)

The Court: The objections are overruled. The exhibit will be received as No. 3. [119]

(The document referred to was received in evidence as Plaintiff's Exhibit No. 3.)

Mr. Crumpacker: We reoffer Exhibit No. 4 for identification, being the returns for the first quarter of 1954.

The Court: Are you the official custodian of that record, Mr. Mew?

The Witness: As chief of the processing branch, I am, sir.

Voir Dire Examination

By Mr. Hoddick:

Q. Mr. Mew, there are some penciled notations that appear across the top of this return, Plaintiff's No. 4 for identification. Do you know when they were put there or by whom?

A. I do not know for certain but I have an idea who put it there. But I do not know when it was put on there.

Q. I also call your attention to item 10, one stamp number that has been crossed out with a red pencil and another stamp number placed therein. Do you know when that was done or by whom?

A. That deletion was made by the members in the cashier's branch. That was made when the return was filed.

Q. You assume it was done at that time and by members in the cashier's branch?

A. According to the office procedure.

(Testimony of Howard H. K. Mew.)

Q. Are you familiar with the procedures in the cashier's [120] branch?

A. Just this portion of it.

Q. Do you know why such a change would be made? A. No, sir.

Q. Also you do not know whether the signature on here is the signature of the defendant?

A. I know that the name Daniel Abdul appeared there.

Q. And you don't know where this document has been since it left the files of which you have the final responsibility?

A. I know that Mr. Crumpacker requested for it.

Q. I say, do you know where it has been since it left your office?

A. Not offhand. I would know it if I would look at the charge sheet to whom it is charged.

Q. Well, that would simply show where the person intended to take it when they took it out, wouldn't it?

A. That person is responsible for the safekeeping of the document.

Q. It would not show where it was in fact, would it? A. No, sir.

Q. And you are unable to state as a fact that you know of your own knowledge as to whether these particular items I call your attention to were added or changed before or after this was removed from your office? A. Which item? [121]

Mr. Crumpacker: I object to that. That is an improper——

(Testimony of Howard H. K. Mew.)

The Court: The objection is overruled.

The Witness: What items, sir?

Q. (By Mr. Hoddick): I refer to the penciled item at the top and the change in the number in item 10.

A. The change in the item 10 was made before the return left the files.

Q. How do you know? Did you look at it before it left your files?

A. Because the returns when they arrived from the cashier's branch must have a number.

Q. Isn't it possible that this return had the number 2160651 when it arrived from the cashier's branch?

A. A number once cannot be changed after we receive it from the cashier's branch.

Q. That is the procedure?

A. That is correct.

Q. Now, as to the pencil notation, you do not know for a fact whether these were added before or after it was withdrawn from your office?

A. Not for certainty, sir.

Mr. Hoddick: Your Honor, we will renew our objection on the ground of lack of proper foundation and would like to urge upon the Court that when the exhibit comes in the entire matter comes in, and if there isn't a foundation for the [122] entire exhibit, we submit it should not be received.

The Court: Is there anything impertinent or damaging in connection with the penciled notations at the top that you have asked the witness about?

(Testimony of Howard H. K. Mew.)

Mr. Hoddick: I have no idea what it relates to.

The Court: What does it say? Read it.

Mr. Hoddick: "2/28 Post Met." It looks like an "EW ATT to form 941 M/L No. 2066."

The Witness: I can explain that, sir.

The Court: Will you explain?

The Witness: It means that the envelope in which the return was mailed in was attached to another return and 2/28 stands for the date in which the notation was made. ATT stands for attached. It means the envelope shows the postmark, envelope bearing the return attached to another return.

Q. (By Mr. Hoddick): If that is the case, Mr. Mew, that notation indicates that the envelope was attached to form 941, doesn't it?

A. 941 bearing the master list number 2066.

Q. That is the form 941 you have in your hand, isn't it?

A. No. This return bearing the number 1997, master list. The envelope is attached to the return bearing the master list number 2066.

Q. But you don't know when that notation was put on? A. Not definitely. [123]

Q. Nor do you have the envelope?

A. No, sir; it is not attached.

Mr. Hoddick: We will renew the objection.

The Court: The objection is overruled. The document will be received as Exhibit 4.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 4.)

(Testimony of Howard H. K. Mew.)

Mr. Crumpacker: We reoffer Exhibit 5 for identification.

The Court: Are you the official custodian of Exhibit No. 5 for identification?

The Witness: As acting chief of the processing branch, I am, sir.

Mr. Hoddick: Mr. Mew, your testimony with reference to Exhibit No. 5 for identification will be the same as it was with reference to Exhibit No. 4, would it not, both with reference to the notation crossed out and the pencil notation at the top and the signature that appears thereon?

The Witness: That is correct, sir.

Mr. Hoddick: We object on the same grounds of lack of proper foundation as to those particular items.

The Court: Same ruling. The document will be received as Exhibit No. 5.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 5.) [124]

Mr. Crumpacker: We reoffer Exhibit No. 7 for identification, it being the third quarter of '54, your Honor.

Mr. Hoddick: Mr. Mew, I notice quite a number of these exhibits have that one number crossed out in item 10 and a new number inserted. Do you have any explanation for that?

The Witness: No, sir.

Mr. Hoddick: And again you do not know if that is the defendant's signature?

(Testimony of Howard H. K. Mew.)

The Witness: I know the name Daniel Abdul appears there.

Mr. Hoddick: And you do not know where this has been since it was removed from the files of your office?

The Witness: No, sir.

Mr. Hoddick: Lack of proper foundation and we object.

The Court: Objection is overruled. The document will be received as Exhibit No. 7.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 7.)

Mr. Crumpacker: I would like to reoffer Exhibit No. 8 for the fourth quarter of '54 return.

Mr. Hoddick: We object to that exhibit, your Honor, preliminarily on the grounds that it is immaterial and irrelevant, being for a period not covered by the indictment.

The Court: The objection is overruled.

Mr. Hoddick: May I also examine the witness with [125] reference to the foundation?

The Court: Yes.

Voir Dire Examination

By Mr. Hoddick:

Q. Mr. Mew, do you know the origin of this tape that is attached to the Exhibit No. 8 for identification? A. I can only assume.

Q. You do not know? A. No, sir.

(Testimony of Howard H. K. Mew.)

Q. And do you know who or when, do you know who crossed out, and do you know when this number 26372 appearing in item 10 was crossed out?

A. I do not.

Q. Do you know what that notation, do you know what that number signifies or how it got there?

A. May I see it? I can only assume.

The Court: You can what?

The Witness: I can only assume.

The Court: The answer is "no," then, is that correct?

The Witness: No, sir; not for a certainty.

Q. (By Mr. Hoddick): You do not know whether this is the signature of the defendant?

A. I know the name to be Daniel Abdul.

Q. And this envelope which is attached to it is postmarked February 1st, is it not? [126]

A. I believe it is.

Q. How is it that no penalty was assessed in this case?

A. May I see that, sir? May I see the calendar for January, 1956, please?

Q. What do you want to see?

A. I would like to see the calendar for 1956, January. (The Court hands a calendar to the witness.) Thank you. Penalty on this return had been imposed for late filing.

Q. (By Mr. Hoddick): It has been imposed?

A. That's correct, sir.

Q. That is by way of an assessment on the back?

A. That's correct.

(Testimony of Howard H. K. Mew.)

Mr. Hoddick: Objection, your Honor, as to lack of proper foundation; and we have already objected to it as immaterial and irrelevant, I believe, and your Honor ruled.

The Court: Here, again, Mr. Mew, you are the official custodian of that form 941 and the attachment thereto, is that correct?

The Witness: As acting chief of the processing branch, I am.

The Court: The objection is overruled. The document will be received as Exhibit 8.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 8.) [127]

* * *

KATSUYOSHI WATANABE

a witness on behalf of the Plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Crumpacker:

Q. Will you state your full name, please?

A. My name is Katsuyoshi Watanabe.

Q. Let me remind you that the acoustics are not too good in the courtroom and everybody has to hear you. So will you speak up as best you can?

A. Yes.

Q. What is your occupation?

A. I am self-employed at the present time. I am in the collection business.

(Testimony of Katsuyoshi Watanabe.)

Q. What was your occupation in 1952 through 1955?

A. I was hired as a bookkeeper by the Home Furniture Company, Limited.

The Court: Now, just a moment. See that lady in [142] the back row of the jury box there?

The Witness: Yes.

The Court: And you see these gentlemen at the end of the table here. They want to hear every word you say. Will you speak louder, please?

The Witness: Yes, sir.

The Court: Will you repeat the last answer?

The Witness: I was hired by the Home Furniture Company, Limited, as a bookkeeper.

Q. (By Mr. Crumpacker): When did you first go to work for Home Furniture?

A. I believe it was in December, 1952; December the 14th, I believe.

Q. And how long did you work there?

A. Through February, 1955; approximately about the 14th of February.

Q. That was full time? A. Yes, sir.

Q. Did you work any more after that?

A. Well, Mr. Abdul asked me if I would do him a favor of working part time, on a part-time basis, and I agreed to it, that I would.

Q. And how long was it that you worked part time?

A. Well, I worked on a part-time basis until I had a case which was brought by the Wage and Hour—— [143]

(Testimony of Katsuyoshi Watanabe.)

Mr. Hoddick: May I interrupt the answer? It is irrelevant and immaterial and I ask it be stricken.

The Court: Well, I will strike from the record the fact of a case being involved. Give us the time. Approximately what time did you stop working part time?

The Witness: That was in approximately '55, probably about August or September.

Q. (By Mr. Crumpacker): And where was it that you worked for Home furniture?

A. 1255 South Beretania Street.

Q. What was the type of business?

A. It was a retail household goods—furniture and household goods.

Q. How many employees worked there at the time you were there?

A. Well, it varied. When I first started, I believe it was about 14, on an average. Then there was about—'53, up to '53 and '54, I will say about 10, and in '55, I think it was about six or seven of us there.

Q. And what, briefly, were the functions of the various employees?

A. Well, we had the office. It consisted of Mr. Abdul, secretary, credit manager, and myself.

Q. Is Mr. Abdul in this courtroom?

A. Yes, sir. [144]

Q. Can you identify him?

A. He is next to Mr. Hoddick, on my left.

Q. The second gentleman sitting at the counsel table to my right?

(Testimony of Katsuyoshi Watanabe.)

A. With the dark suit, in the middle of Mr. Hoddick and the gentleman on his right.

Mr. Crumpacker: May the record reflect the witness has identified the defendant?

Mr. Hoddick: We will so stipulate.

The Court: Yes. The stipulation is approved.

The Witness: Then we had the warehouse, which was located on Kaauwai Street at one time and then was transferred to the airport housing. We had approximately, at the very beginning, I would say we had about five employees. Then it varied down to about—in '54 it was about three and '55 there was one of them. Then we had a janitor, just one janitor. Then at the very beginning we had about six to eight salesmen, '52, '53, about '54 down to approximately two salesmen. In '55, one of the salesmen was transferred to the collection department.

The Court: Will you repeat that last answer? Mrs. Courtney couldn't hear you—the last part of your answer.

The Witness: In 1955 one of the salesmen was transferred to the collection department, so actually we had just one salesman. [145]

Q. (By Mr. Crumpacker): Now, within the office itself how were the duties divided?

A. Well, I took care of the bookkeeping, all of the bookkeeping transactions, also collected receipts from the customers, and also I answered the PBX that he had, and took collection payments, also.

Q. And during this period that you were there, who ran the business, who was the boss?

(Testimony of Katsuyoshi Watanabe.)

A. Well, Mr. Abdul was the boss, sir.

Q. Aside from his being the boss, do you know what his title was?

A. Well, he was the president and the general manager of Home Furniture Company, Limited.

Q. Who else, if you know, had anything to do with the direction of the business?

A. No one except I understood that Mrs. Abdul was the secretary-treasurer.

Q. Did she have anything to do with the direction——

The Court: Can you hear? Will you read the last question and answer. And, Mr. Watanabe, we will get along a lot better if you will try to speak louder, please.

(The record was read by the reporter.)

Q. (By Mr. Crumpacker): From your own observation what did Mrs. Abdul have to do with the operation of the business? A. Mr.—— [146]

Q. Mrs. Abdul?

A. Well, I haven't actually seen her work in the office. Only at times I have seen her, I guess you would call it the display work, the sales department.

Q. What specific duties did she have, if any, that you know? A. None, sir.

Q. What was the gross business, if you know, of the company during the years 1953 to 1954 and 1955?

Mr. Hoddick: Object to the question, your Honor, immaterial and irrelevant.

(Testimony of Katsuyoshi Watanabe.)

The Court: Mr. Crumpacker, what do you have to say to that?

Mr. Crumpacker: Well, I will withdraw the question.

The Court: Very well.

Q. (By Mr. Crumpacker): What were your duties?

A. I, as I said, I took care of all the bookkeeping transactions and also computed the tax, monthly and quarterly tax reports.

Q. And from what did you compute the tax?

A. From the payroll records, sir.

Q. And who prepared the payroll records?

A. I did, sir.

Q. Would you state how you prepared the payroll records?

A. Well, we had a mimeograph, typed form for all payrolls, [147] and semiannually I would compute the wages on this form. It had—on this form it had the names, the withholding tax, the Territorial 2 per cent, the Social Security and Federal withholding, we had insurance and also advances and also had the list of net balance and the check-number columns.

Q. Net balance and check number?

A. Check-number columns.

Q. The net balance being what?

A. I beg your pardon, sir?

Q. What is the net balance?

(Testimony of Katsuyoshi Watanabe.)

A. After the taxes are deducted and whatever the other deductions are computed.

Q. Is that the amount paid to the employee?

A. Net amount paid to the employees.

Q. And the check number; what was that?

A. That is the check issued against the amount due to the employees.

Q. And what was done with those payrolls after they were completed?

A. Well, the taxes—after it was withheld, I prepared—in fact, the government sent me—the Reserve Bank sent me a blank and the number of the form was 450, sent me a blank to have them prepared and to be deposited the following month on or before—it was either the 10th or the 15th day of the following month—to be deposited to any of the Reserve Banks. And [148] it so happened the closest bank we had dealt with at the time was the American Security Bank on the Makiki Branch.

Q. And what was the procedure that you used with that form?

A. Well, after I had prepared the form, the check was drawn against the amount which was withheld and that was taken to the bank, to the cashier. And after she had accepted the check, she would give me a receipt saying that it was for the federal withholding taxes. Then before the following month's taxes, withholding taxes was due, then they would send me a blank with this first depository receipt. Then after this was—the second month was prepared, I followed the same routine, went to the

(Testimony of Katsuyoshi Watanabe.)

bank, deposited, got the receipt. Then the Reserve Bank would send me the form, back to me at the end of the third month or before the following month I would prepare the quarterly return and this would be computed from the payroll records. And on the back of the quarterly return I would list down the serial numbers of the depository receipts, the amount and the date it was accepted. Then for the third month I would make the check for the differential of the total taxes due for the quarter, and there would be two depository receipts plus a check. The check is for the last month.

Q. In making these payments to the bank, you say you drew a check? A. Yes.

Q. You had a depository receipt? [149]

A. Yes.

Q. Who was it that signed the check?

A. Mr. Abdul did, sir.

Q. Did anyone else sign any checks for the company?

A. Not on the Makiki Branch checks.

Q. What is that?

A. Not on the Makiki Branch. There was other checks that needed two signatures, but not the Makiki Branch papers, sir.

Q. How long did you follow this procedure?

A. Well, I followed this since I was employed, December, I followed this through, the third quarter of 1953. Then on the—November I prepared a depository receipt, I typed out the blanks and I

(Testimony of Katsuyoshi Watanabe.)

drew a check, and spoke to Mr. Abdul that this was due on the 10th or the 15th. The check wasn't signed and all I knew, it was past due, so I couldn't deposit that receipt. Well, the Reserve Bank, because of not receiving our forms, did not send any more blanks to us. So what happened is that when the taxes was due at the end of the quarter, we had to draw up the whole quarter check taxes due instead of—there was no depository receipt because no funds were deposited then.

Q. Before you go on, may I ask you if you can identify Plaintiff's Exhibit No. 1?

A. Yes. This is the quarterly federal tax return 941, [150] sir. And this on the back shows the depository receipt 450 and the serial numbers of the receipts, and also the validation date and the amount, sir. Then way down below here the figure shows the check which should accompany this form, with the depository receipt and the check. And the form should be sent into the District Director of Internal Revenue.

Q. Did you prepare that form?

A. Yes, sir, I did.

Q. When was that prepared?

A. I normally prepared these forms about the—see, it is due on or before the 31st day of the following month after the quarter is ended, and I would prepare, normally, about the 23rd, approximately about the 23rd.

Q. Do you know when you prepared that particular form?

(Testimony of Katsuyoshi Watanabe.)

A. Well, I sent this to—I must have prepared this before the due date. It shows that was received on the 22nd.

Q. What did you do with it after you prepared it?

A. Well, after the forms were prepared the check was drawn—the earliest beginning, his secretary made out the checks and then that was drawn up and that was left on his desk for his signature on the checks, plus the forms.

Q. Do you know who drew the check up for that return?

A. This probably was drawn by Miss Yasuda, she is known as Mrs. Ishizaki now.

Q. And when you had prepared the form, how did you [151-152] process it, after preparing it?

A. Well, all of the entries are checked, checks—the check was recorded in the check record, and also the general journal. The normal transaction was transacted.

Q. What did you do with the form itself after you completed it?

A. Well, it was left on Mr. Abdul's desk and my retaining copy was filed automatically in the tax file, receipt file that we have—that we had.

Q. Where is that file now?

A. Well, the last I knew was when the—we had it in the store on the left-hand drawer in a manila folder that we have there.

Q. That is in the office, is that what you refer to?

A. Yes, sir, on Beretania Street, sir.

(Testimony of Katsuyoshi Watanabe.)

Q. Do you recognize the signature on that form?

A. Yes. This belongs to Mr. Abdul, sir.

Q. You can identify that as Mr. Abdul's signature?

A. Yes, sir.

Q. Where did this form come from which you prepared, the return?

A. The District Director, sir.

Q. And can you briefly state what was on the form at the time you received it?

A. Well, it shows the total we had of withholding from [153] wages, total tax withheld from wages.

Q. My question is: In what form was it when it was received by you?

A. It was my payroll records, sir.

The Court: What did you say?

The Witness: Payroll record, sir.

Q. (By Mr. Crumpacker): No. You don't understand the question. The question is: How did the blank form come to you from the District Director's office, in what form? That is, what was on the form when you received it from the District Director's office?

A. Well, it has the company's name, also had the—I guess they call it the identification, the address, for the quarter taxes due and due on such-and-such a date.

Q. You are referring to the items appearing in section 10; is that right?

A. That is right.

Q. Was this the size of the form or was the form larger than that originally?

A. Well, they had certain schedules attached to

(Testimony of Katsuyoshi Watanabe.)

that with listing of names, the account number and the amount of the taxes.

Q. I show you Plaintiff's Exhibit 12 and ask you if you can identify that as being a blank form 941?

A. Yes, sir. [154]

Q. You referred to the schedules in connection with Exhibit 1?

A. Yes, sir.

Q. As the same schedules as appear on this?

A. Yes, sir, exactly the same, sir.

Q. Now, continuing on from the time you stated in November, you were unable to make your depository receipts?

A. Yes, sir.

Q. You say you prepared the quarterly return for the last quarter of 1953?

A. Yes, sir.

Q. And do you recall when you did that?

A. That was prepared on or before the 31st day of January, 1954.

Q. And what did you do with it when you prepared it?

A. Well, the check was drawn and it was left on his desk.

The Court: We can't hear you.

The Witness: The check was drawn against the amount due to the District Director and was left on his desk for his signature.

Q. (By Mr. Crumpacker): Do you know what happened to it after that?

A. Well, I have seen the forms. In fact, I have seen several checks which I had made that was in—on his desk, or [155] it was on his tray which was

(Testimony of Katsuyoshi Watanabe.)

laid—set on his desk, in a manila folder. Some was with signatures and some was without signatures.

Q. And during what period was that?

A. Well, this was the period '53 right on to '55, I think.

Q. Now, specifically do you know what happened to the form which you say you prepared for the last quarter of 1953 after you placed it on his desk?

A. He had placed it in his folder that he had on his desk, sir.

Q. Do you know where it went from there?

A. Well, he had it on his desk and sometimes it was in the safe. Most of the time it was on his desk.

Q. Do you know for how long?

A. Well, ever since I was there from '53 on, sir.

The Court: What was that last?

The Witness: Ever since I was there, since '53.

Q. (By Mr. Crumpacker): Well, when was that due? A. I beg your pardon, sir?

Q. When was the last quarter of the '53 return which you say you prepared, when was that due?

A. That was supposed to be due on or before the 31st day of January, 1954.

Q. When you say you noticed it on his desk after that [156] date—— A. Yes, I did.

Q. ——did you ever discuss it with him?

A. I discussed the matter with Mr. Abdul when I got calls and visits from the District Director, the agents that were up at his office, sir.

Q. When did you receive your first call, approximately? A. Approximately April.

(Testimony of Katsuyoshi Watanabe.)

Q. Of 1954? A. Right.

Q. I show you Plaintiff's Exhibit No. 2, which is a return for the fourth quarter of 1953, and ask you if you can identify that?

A. This was taken from the original form 941 which was prepared on the—January, 1954.

Q. Is that or is that not the original that you prepared?

A. I don't recall this one here.

The Court: We didn't hear your answer.

The Witness: I don't recall this one here, this particular one. I prepared the original, then Home Furniture had requested for duplicate forms, blank forms. I have prepared those, and that is all.

Q. (By Mr. Crumpacker): But you did prepare this particular one? Can you tell whether this is the one that you prepared? [157]

A. Not this one, not that I recall.

The Court: I can't hear, Mr. Watanabe. I told you these other people have to hear you, so keep your voice up. Do you want a glass of water?

The Witness: No, sir.

Mr. Hoddick: Can we have the reporter read that?

The Court: Yes.

(The record was read by the reporter.)

Q. (By Mr. Crumpacker): At any rate, it is your testimony this is not the original which you prepared?

A. Yes, sir, that is not the original.

(Testimony of Katsuyoshi Watanabe.)

Q. Can you identify the signature on that?

A. Yes, sir. This belongs to Mr. Abdul.

Q. Now, at the time you prepared the fourth quarter 1954 return—excuse me—1953 return, did you prepare any other tax form for the District Director's office?

A. Yes. I prepared the annual form. I can't recall what form number it is, though. The annual form was prepared. It looks similiar to the quarterly form, 941.

Q. And what information was placed on that form?

A. The total amount of taxes withheld, also the number of W-2 forms attached, W-2a forms attached with this report, and also the total taxes withheld per quarter for the calendar year.

Q. And what happened to the employees' W-2 forms? [158]

A. Oh, I have sent that out at times, sir. That was sent out before the end of the 31st day of January.

Q. Did they go with the form you have already referred to? A. The 2a, sir.

Q. May I ask you if you can identify Plaintiff's Exhibit 3?

A. Yes, sir. This is the form that I have just mentioned.

Q. And that was prepared by you as you testified at the end of the year '53?

A. Yes, sir, that was prepared sometime in January.

(Testimony of Katsuyoshi Watanabe.)

Q. Do you know whether or not you prepared that at the same time that you prepared the fourth quarter, 1953?

A. Yes. In fact the fourth quarter return was prepared ahead of this particular form, sir.

Q. And the information from that placed on this form?

A. Yes, that was compiled, got together and all of the figures was obtained from the quarterly returns.

Q. And what happened to this form after you prepared it, Exhibit 3?

A. This form here does not require the officer of the company's signature, so that was sent in automatically. In fact, I had mentioned to Mr. Abdul what this was all about, and this does not require his signature, so this was sent in with the 2a forms. [159]

Q. You did discuss it with him before you sent it in?

A. Yes, I normally discussed the forms that I prepared, of the forms.

Q. Well, did he acknowledge in any way—you say you explained what the purpose of the form was to him? A. Right, sir.

Q. And where was the third quarter, fourth quarter 941 at that time?

A. It was on his desk, sir.

Q. Going back to your payroll, let me ask you, you say you prepared the payroll records and put

(Testimony of Katsuyoshi Watanabe.)

them in a Home Furniture Company file and the last you knew of that file it was in the office?

A. You mean the tax forms or payroll records?

Q. No, payroll.

A. The payroll records were on the desk, in the lefthand drawer. The tax receipts were in the safe, in the drawer.

Q. I see. After you prepared the payroll which you say contained the withholding schedules on it——

A. Yes, sir.

Q. ——what did you do with that? You say you used that to prepare the tax return. Did you use it for any other purpose? In other words, what other bookkeeping did you do with regard to the payroll?

A. We had—I had to prepare the individual payroll records. [160]

Q. Well, what bookkeeping entries did you make as a result of the payroll records?

A. Well, on the checking record, the net amount of the check was credited against the bank account and the net amount was credited to accrued wages, and a journal entry, the gross amount was debited to salaries or wages paid, the taxes were credited to—liable as credited to whatever taxes payable to whichever government was due. Then the net amount was credited to the accrued wages.

Q. And what did you call the account in your general ledger in relation to these tax withholdings?

A. It was called the taxes payable. At all columns, the particular sheets had several columns, and on the top of the heading we would put all the

(Testimony of Katsuyoshi Watanabe.)

withholding taxes, the government taxes was on one page—I mean the federal government, and the territorial taxes was on the other. It was all segregated.

Q. And when you issued a check to the federal depository what entry was made to reflect that?

A. Well, there was—a check was drawn, so that was credited to the bank, and the amount deposited was debited to the accrued taxes.

Q. To what? A. Accrued taxes.

Q. Accrued taxes? A. Right. [161]

Q. You previously have stated that the forms you prepared were similar to this Exhibit No. 12. Can you state what form was placed on the bottom half?

A. The employee's account number, the Social Security number, the name of the employee, then the wages paid to the employees for whichever quarter it was, and the territorial unemployment.

Q. And the total amounts at the bottom?

A. Yes, sir; the total amount. That equals the—that figure is added with all the rest of the column.

Q. What do you use the total figure for?

A. To compute the taxes that the employer pays.

Q. That is the employer's share of th—

A. Social Security.

Q. —Social Security? A. Right.

Q. Now, you referred to your tax account in your general ledger; how often were entries made in there against the federal tax account?

A. Well, the posting was done every day, the journal postings, then this at the end of the month

(Testimony of Katsuyoshi Watanabe.)

and the total was posted to the ledger once a month, at the end of the month.

Q. That information from the payroll record?

A. Yes, sir.

Q. Now, directing your attention to the first quarter [162] of 1954, did you prepare a return for your federal withholding?

A. Yes, sir. That was prepared some time in April, on or before the 31st day.

Q. And what did you do with that one when you prepared it?

A. After it was prepared, then a check was drawn against it and it was left on his desk for his signature.

Q. Do you know what happened to it after that?

A. Well, these forms were kept in his manila folder with the rest of the checks that he had on his desk.

Q. Do you know what happened to it from there?

A. No. It was in the folder for quite some time, in fact, I can remember ever since I was employed there.

Q. And the second quarter of 1954, did you prepare the return for that quarter?

A. Yes, sir; I did.

Q. And what happened to that one?

A. Well, it was prepared and check was drawn and it was left on his desk for his signature.

Q. What happened to it after that, if you know?

A. It was in his folder, left it in his folder.

(Testimony of Katsuyoshi Watanabe.)

Q. And the third quarter of 1954?

A. The same procedure.

Q. And what happened to the return for the third quarter of '54, if you know? [163]

A. It was prepared, sir. That was also left on his desk, check was drawn and it was left on his desk for his signature.

Q. Do you know what happened to it after that?

A. Left in his manila folder again, which was located on his desk.

Q. Do you know whether or not it was ever mailed or any one of the 19—the first three quarters of 1954, whether they were ever sent in?

A. Not that I know of. I have seen them in his manila folder. It was left in his manila folder.

Q. They weren't sent in to your knowledge?

A. No, sir.

Q. Now, you say that you brought the matter to Mr. Abdul's attention after you received a call from one of the revenue agents?

A. Yes, sir.

Q. And when was that?

A. Some time in April.

Q. April of 1954? A. '54; right.

Q. And who was that agent?

A. Miss Burns.

Q. Miss Burns? A. Burns; right. [164]

Q. What did you do when she came into the office?

A. Well, I—she questioned me about the—

Mr. Hoddick: One second, Mr. Witness. I am advised that Miss Burns is presently in the court-

(Testimony of Katsuyoshi Watanabe.)

room, and at this time we would like to renew our motion to have other witnesses excluded, since they are obviously going to be testifying to the same things, so it might be prejudicial.

The Court: Sometimes it is a verification rather than prejudicial. In order that no question may be raised, I will ask Miss Burns to remain out of the courtroom for the time being.

Mr. Crumpacker: May the record reflect Miss Burns left the courtroom, your Honor?

The Court: Yes.

Q. (By Mr. Crumpacker): Will you explain what happened when Miss Burns contacted you?

A. Well, she came over to the office, she questioned me about the returns, so I told her that I had prepared it and also drew a check against it, but whether they were submitted to the District Director, I said I couldn't tell, I didn't know. In fact, I couldn't—I was reluctant to release any information because I was still employed at Home Furniture. So I got my—the retaining copy from the files and show it to Miss Burns, our retaining copy and also my check record.

Q. And you showed those to Miss Burns? [165]

A. Yes, sir.

Q. As a result of that you say you brought the matter to Mr. Abdul's attention?

A. Yes, sir. After she had left—I believe Mr. Abdul was out then—when he returned I told Mr. Abdul that Miss Burns from the Revenue was over and she had questioned me on those reports that he

(Testimony of Katsuyoshi Watanabe.)

had in the folder, and his answer was that he was going to take care of it. And, in fact, she left her number with me, telephone number, to have Mr. Abdul call her.

Q. And what did you do with that telephone number?

A. Well, I gave it to him on a scratch paper.

Q. Then you say following that date you prepared the returns for the first three quarters of 1954 on a timely basis. Directing your attention to November of 1954, did you have any occasion to talk to Miss Burns again with respect to these returns?

A. Yes, sir; I did.

Q. When and how many times?

A. I spoke to Miss Burns several times on the phone, and also she was in my—our office a couple of times.

Q. And what was the subject of the conversation?

A. It was pertaining to the forms, not receiving those quarterly returns.

Q. Which ones? A. '53. [166]

Q. You are referring to the one for 1953?

A. Yes, sir.

Q. The last quarter of 1953? A. Yes, sir.

Q. Was there ever any discussion about the 1954 returns?

A. Yes; she also mentioned that; she questioned that they also did not receive those returns, and I also told her that, again, I mentioned that I had prepared and I had the retaining copy of those

(Testimony of Katsuyoshi Watanabe.)

forms that I prepared. Again, whether it was submitted to the Internal Revenue, I didn't know about it.

Q. Approximately how many times did you talk to her in November?

A. I think about four times, I believe.

Q. What did you do as a result of your conversations with her?

A. Each time she would leave her number with me and I would speak to Mr. Abdul. Then I would tell him what it was all about again, it had to do with the tax forms that he had in his folder.

Q. How many times did you bring this matter to Mr. Abdul's attention?

A. Each time the agent——

Q. Each time she talked to you about it?

A. ——questioned me about it. [167]

Q. What was his response?

A. He said that he would take care of it, sir.

Q. You say you had previously seen some of these delinquent forms in his desk or in a folder on his desk?

A. Yes; I did, sir.

Q. Does that pertain to all four of them?

A. His quarterly taxes.

Q. Including the first three quarters of '54?

A. Yes, sir.

Q. When was the last time you saw those on his desk?

A. I believe I have seen one in '55, January, I believe, if I am not mistaken.

Q. Now, directing your attention to the month

(Testimony of Katsuyoshi Watanabe.)

of December, 1954, did you have occasion to talk to Mr. Chock over the telephone?

A. Yes. He had called me. I believe I was out then. I returned his call, then he was out.

Q. Who is Mr. Chock?

A. He was one of the agents, federal agents.

Q. From the Internal Revenue Service?

A. From the Internal Revenue Service, sir. And then when I finally got hold of Mr. Chock, I told him exactly what I had told Miss Burns. In fact, I added a few more statements that if they could mail a duplicate blank that I would prepare the reports again. [168]

Q. What happened as a result of that conversation?

A. Well, I did receive—later I received—in December I received three copies, blank copies of those forms, and I prepared those and I drew a check against those forms, and that was also left on his desk.

Q. For each one of them? A. Yes, sir.

Q. And from what did you get the information to prepare those?

A. Well, from a retaining copy.

Q. I show you Plaintiff's Exhibits 4, 5 and 7 and ask you if you can identify those—oh, and 6, also—4, 5, 6 and 7?

A. Yes. These are the checks. This is the check that I had prepared which was returned by the bank. These are the forms that I had prepared.

Q. Do you identify the signature on those

(Testimony of Katsuyoshi Watanabe.)

forms? A. This belongs to Mr. Abdul.

Q. On each one of them? A. Yes, sir.

Q. And when were those prepared?

A. Some time in December.

Q. Incidentally, Plaintiff's Exhibit No. 6, whose handwriting is that check in, that being a photostat of a check?

A. This was my writing and the signature is Mr. Abdul's. [169]

Q. Your writing?

A. In the payable column.

Q. And Mr. Abdul's signature? A. Right.

Q. Excuse me. When did you say those were prepared? A. Some time in December.

Q. Can you tell by reference to any of the Exhibits?

A. This check was drawn December the 27th, '54. So was the report.

Q. The returns, the three returns were prepared at the same time? A. Yes, sir.

Q. And three checks? A. Yes, sir.

Q. This being a photostat of one of the checks?

A. One of the checks, sir.

Q. You say you received only three forms?

A. Yes, sir.

Q. Although it had been brought to your attention that there were four that were delinquent?

A. There were four.

Q. So you prepared duplicates for the first three quarters of 1954. What did you do with them?

A. Well, it was prepared and it was left on his

(Testimony of Katsuyoshi Watanabe.)

desk with a check drawn against it. Each report had—each check was [170] accompanied with the report. And after that—the original check was drawn on the American Security Bank, Makiki Branch, and the new checks which was drawn December 27, '54, was drawn on the Central Pacific Bank, sir. I made a reverse entry on the first check which was drawn on the Makiki Branch, American Security Bank.

Q. What do you mean by a “reverse entry”?

A. Well, because the first check—we had voided the first three checks that the—that had not gone through the bank for processing. It was not cashed at all.

Q. So the reversing entry is to strike out the first ones and enter the next ones in their place; is that right?

A. Yes, sir.

Q. And you placed these returns with the checks on Mr. Abdul's desk. Do you know what happened to them after that?

A. It was in his folder, sir.

Q. Do you know whether they were ever mailed?

A. Not while I was working there steadily.

Q. Did you ever prepare any other duplicates?

A. No; just once.

Q. Just that one time?

A. One time.

Q. Now, you say these were in a folder on his desk. Was there anything else in that folder?

A. Well, all he had in the folder was checks that was [171] made which were—some of them was signed, some was not signed—which was payable to

(Testimony of Katsuyoshi Watanabe.)

some creditors, some individuals, and some to the tax people.

Q. It was a folder containing, then, you might say, disbursements of some kind? A. Right.

Q. Nothing but potential disbursements?

A. Right.

Q. With the prepared checks? A. Yes.

Q. Some signed and some unsigned?

A. Some signed, some unsigned.

Q. In each case for obligations that were due?

A. Yes, sir.

Q. Can you give any reason why they were retained in that file and not processed immediately?

A. Because of the insufficient funds that we had in the bank.

Q. And how was it decided which ones to pay and which ones not to pay?

A. That is handled by Mr. Abdul.

Q. And how did he get his information as to what funds were available?

A. Well, we had a mimeographed report that was prepared for the mornings, and this report would show his expenses for [172] the day, previous day, the income for the sales for the previous days, and also the outstanding contracts in transit with the finance company.

Q. In transit? A. Yes, sir.

Q. What do you mean by that?

A. Well, we would type some contracts up today for financing, and these people, at the very beginning, is located up in the mainland in California.

(Testimony of Katsuyoshi Watanabe.)

It was known as the State Investment. They are known as the Equitable Plan Company today. And because they were in the states, there would be contracts on the way for processing. In other words, they would buy these contracts, whether on a non——

Mr. Hoddick: Just one second. May I interrupt to object? It would appear to be irrelevant and immaterial.

The Court: I think you have answered the question. There were contracts that were coming from California to Honolulu; is that correct?

The Witness: No; it wasn't contracts that were coming to Honolulu; it was contracts that were going to California.

The Court: Well, that is what you speak of as being in transit?

The Witness: In transit, sir.

The Court: Well, I think that covers it.

Q. (By Mr. Crumpacker): And what happened to those contracts [173] when they got to California?

Mr. Hoddick: Object to that on the ground it is immaterial and irrelevant.

Mr. Crumpacker: It is a matter of financing of the company.

The Court: Yes. The objection is overruled.

Q. (By Mr. Crumpacker): What happened to those contracts which were sent to the mainland?

A. Well, after the finance company have received those contracts, they would accept—whether

(Testimony of Katsuyoshi Watanabe.)

they would accept or reject the credit, the ones that they had accepted, the proceeds would be deposited to the bank that we had on the mainland, which is the Bank of America at that time.

Q. Was that same procedure used with all contracts?

A. All contracts except we had those, as I said, that was rejected. Some of it was six-month contracts with small amounts, or a 90-day account, a cash deal, we call it, was not sent to the mainland.

Q. With the exception of those, the general procedure, you say, was to send them to the mainland?

A. The bulk of it was sent to the mainland.

Q. And they were discounted, is that the word?

A. Discounted, sir.

Q. That means what?

A. Was financed or the finance advanced the money to the [174] company. Whether it was on the contract, was on a nonrecourse or recourse, I am not sure of that. I am not positive which way it was, because it makes a difference whether it was recourse or nonrecourse.

Q. But in either case the discounted amount was received in exchange, is that right?

A. Yes; the proceeds was automatically deposited to the bank account.

Q. What percentage of these time contracts would you say were discounted, what percentage would you say were retained by the company?

Mr. Hoddick: Your Honor, we object, again,

(Testimony of Katsuyoshi Watanabe.)

immaterial and irrelevant. I think we are a long way from the employees' tax withholding.

The Court: The objection is overruled.

Q. (By Mr. Crumpacker): Do you understand the question? A. Yes.

Q. That is, dollar-wise?

A. Well, I would say that in the—within the year period that we would have discounted in '52, my company record shows that he had discounted approximately about \$500,000, I think.

Q. 1952?

A. And '53 I would say about two; '54 I would say about fifteen—\$150,000.

The Court: When you speak of two, are you talking [175] about two dollars?

The Witness: No.

The Court: Two what?

The Witness: \$200,000.

Q. (By Mr. Crumpacker): What was the total amount of business during those years, '52—

Mr. Hoddick: Your Honor, might I suggest that '52 be eliminated, entirely outside of the scope of the indictment?

The Court: You may suggest; if you want to object, that is a different matter.

Mr. Hoddick: I object to it and move that the answer with regard to '52 be stricken.

Mr. Crumpacker: Let me rephrase the question in that respect.

Q. What was the total business during the years 1953 and '54?

(Testimony of Katsuyoshi Watanabe.)

A. '53, I would imagine, was about \$400,000, and '54, \$300,000.

Q. So that from one-half to two-thirds, approximately, of the business was discounted; is that right? A. Yes.

Q. Now, you say you prepared information for Mr. Abdul from which he could determine how goes it, is that what you call it?

A. Yes. It is a daily operation report; the amount of [176] sales, the amount of receipts, the amount of disbursements and the amount of contracts in transit.

Q. At the time you prepared these tax returns during the time that they were on his desk or in that folder, was there money available to pay this?

A. Well, our check record shows that they were overdrawn, heavily overdrawn.

Q. On what occasion?

A. On all occasions.

Q. All the time?

A. Just about all the time.

Q. But there were disbursements going out all the time, were there not? A. Yes, sir.

Q. So that it is true that there were some monies available, but, as you say, you were overdrawn at certain times. But my question is: Was there money during this period?

A. Yes; there were funds in there.

Q. Which could have been used to pay these taxes? A. Could have done.

(Testimony of Katsuyoshi Watanabe.)

Q. It just happened that they were used for some other purpose?

Mr. Hoddick: I object to that as leading and suggestive, your Honor.

The Court: Objection sustained. Is this a convenient [177] place to interrupt your examination?

Mr. Crumpacker: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, you are excused for recess.

(A recess was taken.)

(After recess.)

The Court: The record will show the jury is present, the defendant and his counsel.

Q. (By Mr. Crumpacker): Before the recess, Mr. Watanabe, in response to my questions about monies available for the payment of these taxes, you, first, I believe, stated that you were overdrawn. What do you mean by "overdrawn"?

A. Our records, bank balance records were overdrawn, but the bank balance with the bank, there was funds to pay the taxes.

The Court: I could not hear the last part of that answer. You have a tendency to let your voice drop. You are doing better than you did at the start. Will you read the last answer?

(The record was read by the reporter.)

Q. (By Mr. Crumpacker): How can you account for the difference?

A. Well, at the end of the month the bank would

(Testimony of Katsuyoshi Watanabe.)

send me the statement, also the canceled checks. Then I would reconcile those, the check balance, get the total amount of the outstanding checks and, actually, get the true balance from the bank.

Q. The difference, then, was due to the fact that the [178] checks were outstanding?

A. Yes, sir.

Q. Now, you say that you discussed this on several occasions, the delinquencies on several occasions with Mr. Abdul? A. Yes, sir.

Q. What suggestions, if any, did you give him with regard to——

A. On my suggestion to Mr. Abdul—my suggestion to Mr. Abdul was this: That if he couldn't have those checks sent in, he could very well send in only the reports.

Q. What was his response to that suggestion?

A. Well, he just nodded his head.

Q. Now, directing your attention to January 10, 1955, did you have occasion to discuss this matter with Mr. Fiellin and Miss Burns?

A. Yes, sir; I did.

Q. Will you state what happened on that occasion?

A. Well, they questioned me about those——

Mr. Hoddick: Just one second. I'm going to object to that as calling for hearsay testimony unless it is shown it was in the defendant's presence.

Mr. Crumpacker: The question was: What took place on that occasion? I am not asking what was said.

(Testimony of Katsuyoshi Watanabe.)

The Court: Well, you had a conversation; is that right? [179]

The Witness: Yes, sir.

The Court: All right. Don't say what was said.

Q. (By Mr. Crumpacker): What was the subject of the conversation?

A. Those quarterly returns.

Q. And what did you advise them at that time?

Mr. Hoddick: I object to that as being entirely immaterial and irrelevant.

The Court: I think it is also objectionable on the ground of hearsay, Mr. Crumpacker. The defendant was not present.

Mr. Crumpacker: I am merely asking him what he advised them, not what they said.

Mr. Hoddick: My objection was that that would be immaterial and irrelevant unless he was following the directions of the defendant.

The Court: You might try to lay that foundation, if you can.

Q. (By Mr. Crumpacker): Will you state just what returns you were referring to as the nature of the conversation?

A. The '52 quarterly—for the four quarters, '52, '53 and '54.

Q. Will you state a little more in detail what was the nature of the discussion?

Mr. Hoddick: Your Honor, we will object to that as [180] going behind the hearsay objection.

The Court: The subject of the conversation was the quarterly returns. That is correct, is it not?

(Testimony of Katsuyoshi Watanabe.)

The Witness: Yes, sir.

Q. (By Mr. Crumpacker): All right. Now, could you specify which quarterly returns? In other words, was it the ones that you prepared or the ones that—just merely the ones that were delinquent? A. The ones that I had prepared.

Q. Now, specifically, which ones were referred to? A. The '53, '54.

Q. How many had you prepared for '53 and '54 at that time?

A. I prepared originals, also a duplicate, and there were two sets.

Q. Did this conversation have to do with the duplicates as well as the originals?

A. No; not the originals. The duplicates that was given to me in December.

Q. And those were the subject matter of the conversation at that time? A. Yes, sir.

Q. And what did you advise them with respect to the duplicates?

Mr. Hoddick: I object to that, your Honor; immaterial and irrelevant, no proper foundation. [181]

The Court: Objection sustained.

Q. (By Mr. Crumpacker): And who prepared the form for the fourth quarter of 1954?

A. I did, sir.

Q. When was that prepared?

A. January, '55.

Q. What did you do with that after you prepared it?

(Testimony of Katsuyoshi Watanabe.)

A. The same procedure. I prepared—drew the check, laid it on his desk, left it in his folder.

Q. What information was placed on that form?

A. The necessary information, sir.

Q. I show you Plaintiff's Exhibit No. 8 and ask you if you can identify that?

A. Yes, sir. That is the form that I prepared.

Q. What did you prepare along with the form, if anything?

A. Also the—in '55, the annual report form had—has been changed a little bit, compared with the previous years, and on the back of the forms, all the quarterly forms, quarterly reports, the form was to be typed in. And in doing so, this check for this last quarter should have been submitted to the District Director. In other words, this could not have been sent in without the check.

Q. And was anything else prepared along with that form?

A. The 2a's, that is the duplicate of the W-2 forms.

Q. They are not there; is that correct? [183]

A. No; not here, sir.

Q. What is this tape? Can you identify that tape?

A. That is the tape in balance with the payroll, individual record of the withholding taxes, the 2a forms.

Q. Who prepared that? A. I did, sir.

Q. Can you identify the signature on that form?

A. This belongs to Mr. Abdul.

(Testimony of Katsuyoshi Watanabe.)

Q. What did you do with that when you prepared it?

A. Well, this was prepared and check was drawn and it was left on his desk.

Q. And where were the duplicates of the first three quarters of '54 at that time?

A. The duplicates were in the file. You mean the retaining copy?

Q. No. I mean the—excuse me. There may be confusion. I don't mean the retained copy. I mean the duplicate originals which you had prepared in December.

A. The original of the duplicate, the second set, you mean?

Q. Second set. A. It was in his folder, sir.

Q. At the time that this was placed on his desk?

A. Yes, sir.

Q. When was it that you terminated your regular full-time [184] employment?

A. February, '55.

Q. 1955? A. Yes, sir.

Q. That is the month following preparation of this form? A. Yes, sir.

Q. Exhibit 8. Directing your attention to the month of March, on or about the 11th of March, did you have occasion to discuss with Mr. Abdul any of these delinquent forms, returns?

A. That was March, you said?

Q. Yes. A. Yes. I received a call—

Mr. Hoddick: Your Honor, I will object to the question, if he is getting into the subject matter,

(Testimony of Katsuyoshi Watanabe.)

unless a better foundation is laid as to time, place and persons present.

The Court: Yes. You should lay a foundation. The witness started to say something about being called; is that correct?

The Witness: Yes; I was called at my employment.

The Court: And as a result of that call did you go out and see Mr. Abdul?

The Witness: Not at the time.

The Court: Well, proceed, Mr. Crumpacker.

Q. (By Mr. Crumpacker): You say you received a call from him? [185]

A. A telephone call. He wanted to know where the forms were, the retaining copies were. Then I told him that was in——

Q. Any particular form referred to?

A. He mentioned about the—in fact, what he actually had mentioned was what happened to all of the forms. So I had mentioned that it was in the safe, the left-hand drawer.

Q. The forms you are referring to as the retained copies——

A. Retained copies of all of the forms that we had prepared.

Q. And he asked you where they were located in the office? A. Yes, sir.

Q. Was that the sum and substance of the conversation? A. Yes, sir.

Q. Now, who prepared the return for the first quarter of 1955, if you know?

(Testimony of Katsuyoshi Watanabe.)

A. I believe I did, sir.

Q. And when was that prepared?

A. The first one was prepared April, '55.

Q. And what was prepared with the form, if anything?

A. Check was also—no check, just the form was prepared, and I made a notation that the check should have been made, since I wasn't employed there steadily, that a check should accompany the form. And I stapled a paper, sheet of paper, and made a notation on that of the amount of the check and to whom it was payable and when it was [186] due.

Q. You were not preparing the checks at that time? A. No.

Q. And you stapled this notice to the form?

A. Yes, sir.

Q. What did you do with the form?

A. I left it on his desk.

Q. I show you Plaintiff's Exhibit 9 for identification and ask you if you can identify that? Excuse me. That is Plaintiff's Exhibit 9.

A. This was taken from the original, the one I had prepared.

Q. That is not the one that you prepared?

A. No; because all of the forms that I received, the original had the Addressograph print there. This, I believe, is, looks like a typewriter. It is typed in. The forms that the Federal Director send is Addressograph-type print on the original.

(Testimony of Katsuyoshi Watanabe.)

Q. But that is for the same period you have referred to? A. Yes, sir.

Q. You identify the signature on that?

A. It belongs to Mr. Abdul, sir.

Q. And Plaintiff's Exhibit No. 10, can you identify that? A. This, also——

Q. Excuse me. Before answering that—strike that question. Who prepared the return for the second quarter of 1955? [187]

A. I believe I did, sir.

Q. And when was that prepared?

A. That was prepared in July, '55.

Q. And what was prepared with it, if anything?

A. All I prepared was the form and also the note, the amount due and to whom it was payable and when it was due, which was stapled to the form that was left on his desk.

Q. And you left the form with the note on his desk? A. Yes, sir.

Q. Now, I ask you, can you identify No. 10?

A. This also—the figures are from the original, but the form is not through an Addressograph. It seems like it has been typed in.

Q. But it is for the same period you refer to?

A. Yes, sir.

Q. And can you identify the signature on that?

A. It belongs to Mr. Abdul.

Q. Is there any way you can tell whether the information on Plaintiff's Exhibits 8 and 9—or 9 and 10 is the same as the information on the originals which you prepared? A. No.

(Testimony of Katsuyoshi Watanabe.)

Q. You can't tell from your present knowledge?

A. No.

Q. I show you Plaintiff's Exhibit No. 14 for identification, which is a series of photostats of the bottom half of [188] forms 941 and ask you if there is any way you can identify those?

A. This is the original. These are copies.

Q. Can you explain how you can identify those and if so what they are?

A. Well, first of all, I—the dates, where it says return for the calendar year, I would put an asterisk mark, and one case here has the word "copy." That meant that I made a duplicate copy in some cases.

Q. On how many of those does that appear?

A. Well, on this here it says—one, two—two copies says the word "copy."

Q. Can you identify any of the information contained in those, specifically referring you to the schedule of employees. Do you recognize the names and the salaries?

A. I can recognize the names and also recognize the—this one here, it shows the wages that were paid for the past years, back wages, certain employees. I remember preparing that particular form.

Q. You recall preparing such a form?

A. Yes, sir. We had a good size former employees that we had to pay back wages, and this is one of them. Because at the time I was employed, a number of these employees was not employed.

Mr. Hoddick: Just one second, your Honor. We are getting off on an irrelevant track here. Might

(Testimony of Katsuyoshi Watanabe.)

I suggest that [189] counsel ask questions so we don't have this narrative-type testimony continuing?

The Court: Yes. The witness does amplify at times a little bit too much.

Q. (By Mr. Crumpacker): Let me ask you, can you tell whether these are copies of the forms which you prepared which you have already testified to?

A. Yes; those are copies of the forms that I have prepared.

Q. Which is the bottom half?

A. Bottom half of the 941.

Q. Can you testify whether or not these are copies of the originals which you prepared?

A. No.

Q. You don't know? A. I don't know.

Q. Now, you say that you worked part time until approximately what time, what date?

A. Some time in September, I think.

Q. 1955? A. Right.

Q. Directing your attention to that month, do you recall on or about September 8th having a discussion about any of these delinquent returns with the defendant? A. Yes; I did. [190]

Q. Will you state what the circumstances were, where and when?

A. Well, he called me at my employer's office and he wanted to know, again, what happened to the tax forms for certain periods in 1955. And I had instructed that I had prepared all the forms and the retaining copy is in the tax receipt folder.

(Testimony of Katsuyoshi Watanabe.)

Q. What specific forms or returns were referred to at that time? A. '55.

Q. Any other?

A. Yes. He also mentioned about the '52.

Q. '52? A. Yes, sir.

Q. Or '53?

A. No. This was the '52 that we have not submitted. And that is when—at the time he mentioned that, I had mentioned to him that I just received only three copies, or three blanks, and we were supposed to have received four copies, a new set. I had prepared the three for '53, but none for the end of the '52 quarter.

Q. Aren't you a little mixed up on your dates? You previously referred to three for 1954, duplicates?

A. Let's see. Yes; '53. Wasn't it '53?

Q. In your testimony previously you referred to preparing [191] duplicates for the first three quarters of 1954, if you recall. Would it help you if I showed you some of the exhibits you have already referred to? Referring you to 4, 5 and 7.

A. '53, I prepared the depository receipt. Yes, '54. I remember preparing the depository receipts in '53, that is right.

The Court: I can't hear. What did you say just then?

The Witness: Oh, I said in '53 I recall preparing depository receipts for the first three quarters, and the third—fourth quarter there was no depository receipt.

(Testimony of Katsuyoshi Watanabe.)

Q. (By Mr. Crumpacker): Now, with that in mind let me ask you this: In this conversation you had in which returns were referred to by Mr. Abdul, this conversation you just mentioned——

A. The one in '52 and '55.

Q. Didn't you just say that it was in '53 that you prepared depository receipts up until the last quarter?

A. Yes. Oh, yes, the third—the fourth quarter of '53.

Q. '53? A. Yes.

Q. That one was mentioned. What was the discussion you had with him about that one?

A. Well, he mentioned that—what had happened to the reports, knowing that I had calls regarding these reports and we had requested blanks for the '53 quarter, we just received three [192] of them, and that I could not prepare the new duplicates because no forms was available at the time.

Q. During the period that you were there at Home Furniture Company, what was the payroll, what salaries were paid, if you recall?

A. Well, Mr. Abdul was paid \$800 on a check, another \$800 was applied to his notes payable, account called notes payable. That was credited to the account. Mrs. Abdul was paid \$800 a month. Then the salesman that he had at the earliest time, they were getting paid on a commission basis, then they got salary of \$300 a month. The secretary, her secretary was paid \$250 and she ended up with three, if I am not mistaken.

(Testimony of Katsuyoshi Watanabe.)

Mr. Hoddick: How much was that?

The Witness: Three. I started off with 250 and ended with three.

Mr. Hoddick: Your Honor, the witness' voice is still dropping at the end of his answers. I heard what he started with and didn't hear what he wound up with.

The Witness: I wound up with three.

The Court: You started at \$250 and you ended at \$300; is that right?

The Witness: Yes, sir.

The Court: Keep your voice up.

Q. (By Mr. Crumpacker): You referred to Mr. Abdul's salary of \$800 and a balance credited [193] to——

A. He received a check, gross figure of \$800, and also another \$800 was on a—subject to percentage on the gross of sales at the end of the year. He had an account called notes payable that he would accrue this \$800, the second \$800, after the tax was deducted, and it would be applied against the loan. In other words, he would accumulate whatever wages paid to him on that basis.

Q. With withholdings taken from both?

A. Both, of the \$1,600.

Q. And you say it was credited to a loan account. What was that loan account?

A. Well, I—when I first started working for Mr. Abdul, I questioned him about the accounts, especially on the loan payable account, and to my best knowledge I remember him saying that it was

(Testimony of Katsuyoshi Watanabe.)

similar to a loan that he either would make to the company or the company—it was vice versa, either he will have in excess or he will owe the company.

Q. What was the balance, which way was the balance in that account during the years that you were there?

A. Well, at the end of the year, I believe he owed the corporation.

Q. Will you repeat that?

A. I think at the end of the year, 1954, he owed the company.

Q. That is on that account you are referring to? [194]

A. Yes; notes payable, loans payable.

Q. That included—— A. The \$800.

Q. ——the credits which he had received from the \$800 you have already referred to?

A. Yes, and whatever he drew against it.

Q. So that over and above that there was still a net which he owed the company? A. Yes, sir.

Q. For the year 1954. Who maintained that account in the books?

A. I made all the entries on the books.

Q. What were the drawings from that account for, if you know?

A. Well, some instances—for instance, when it comes through petty cash vouchers, and I wasn't familiar with the type of disbursement, I would go and ask him about it and he would instruct me to put it in the loans payable account. And sometimes there were checks that were made payable to cer-

(Testimony of Katsuyoshi Watanabe.)

tain parties and I wasn't familiar with them, I would question him again and he would have that particular transaction added to the loans payable account.

Q. In other words, they were checks for personal matters?

A. Yes; personal matters.

Q. Funds paid out for him, personally? [195]

A. Right.

Q. Do you know what the balance was at the end of '53 in that account?

A. '53? Not the—I will say, probably about—say about fifteen, probably, he owed the company.

Q. Fifteen what? A. Thousand.

Q. Could you tell if you were able to refer to your account records which you have kept?

A. Yes.

Q. Do you know approximately what the balance was at the end of 1954?

A. I believe in '54 it was about 25, I believe.

The Court: 25 what?

The Witness: 25,000.

Q. (By Mr. Crumpacker): After all his salary was credited to him? A. Yes, sir.

Q. And you say Mrs. Abdul received, during the time you were there, \$800 a month?

A. \$800 a month, sir.

Q. Who owned the building that the company is in, if you know?

A. There was a fellow by the name of Theodore

(Testimony of Katsuyoshi Watanabe.)

Richter. I believe his agent was Mr. [196] Clutterbuck.

Q. What arrangement, if you know, was made with respect to rental and so on?

A. Well, he had also a deposit on rental, a leasehold, and I also questioned him about that particular account and he told me that the balance that he had was advance deposit against the leasehold, and that in event that he decided to purchase the building, the property, I should say, that whatever rental that he had paid on this deposit would be credited as a down payment.

Mr. Hoddick: Just one second. Your Honor, I move to strike the last answer of the witness as having no relevance to this case.

The Court: The objection is overruled. The motion to strike is denied.

Q. (By Mr. Crumpacker): What was the amount of the advance, do you know?

A. Believe it was about \$5,400.

Q. Do you know whether or not the building was ever purchased by him or by the company?

A. I heard that he had purchased it.

Q. You don't know of your own knowledge, though? A. Not of my own knowledge.

Mr. Hoddick: May that answer be stricken, then?

The Court: Yes; it will be stricken and the jury instructed to disregard it. [197]

Mr. Crumpacker: I have no further questions at this time, your Honor.

(Testimony of Katsuyoshi Watanabe.)

Cross-Examination

By Mr. Hoddick:

Q. Mr. Watanabe, you say that you continued working part time for Mr. Abdul at the Home Furnishing Company, Limited, until about September of 1955? A. I believe so.

Q. Do you know for a fact that the returns for the year 1954, the quarterly returns, had not only been filed but paid by the time you left your part-time service with the defendant?

A. I believe I read it in the paper.

Q. Didn't you know for a fact while you were working there as his accountant on a part-time basis that those returns had been filed and paid? I refer to the returns for 1954.

A. I remember reading in the paper.

Q. Mr. Watanabe, at the end of each month did you not make a reconciliation of the checks which were returned from the bank? A. Yes, sir.

Q. And in the course of your part-time employment as an accountant, bookkeeper, for the firm in 1955, did not the checks covering payments of these returns for 1954, were they not returned to the company and cleared by you?

A. In '54? Yes. [198]

Q. So you do know that the taxes were paid for 1954 prior to the time you left the employ of the defendant? A. No.

Q. Well, wasn't it your testimony just now that

(Testimony of Katsuyoshi Watanabe.)

those checks did clear through the bank and come back so that you could reconcile them?

A. No. What I said is that I reconciled the bank statement.

Q. Would you reconcile it each month?

A. Each month.

Q. Do you deny that checks covering payment for taxes for 1954 did not come back negotiated while you were still employed there as an accountant?

Mr. Crumpacker: I will object to the question as being ambiguous. It is a double negative.

The Court: Overruled. Do you understand the question?

Mr. Crumpacker: May the question be read?

The Court: Yes.

(The record was read by the reporter.)

Mr. Hoddick: It is an awkward question. I will withdraw it.

The Court: Very well.

Q. (By Mr. Hoddick): Do you deny, Mr. Watanabe, that while you were working as part-time bookkeeper and accountant for Home Furnishing, Limited, in 1955— [199] A. Yes.

Q. —that checks payable to the District Director of Internal Revenue for withholding tax for the year 1954 came through the bank and through your hands when you reconciled these checks at the end of each month?

A. When did he pay the taxes, '54 taxes?

(Testimony of Katsuyoshi Watanabe.)

Q. I am simply asking you whether you saw any such checks? A. No.

Q. Did you continue reconciling these bank statements to checks throughout the time you were employed there? A. Up to '55, February.

Q. You did not do that after February, 1955?

A. I had another problem in reconciling checks, because Mr. Abdul was writing out the checks, and many times the checks wasn't recorded. I couldn't tell who the check was payable to.

Q. I am not inquiring as to whether you were having a problem reconciling the checks. I am asking whether you, in doing your reconciliation work, whether you saw checks which had been cashed by the District Director of Internal Revenue covering the payments of tax for the period 1954?

A. No.

Q. Did you examine the checks returned from the bank during the year 1955 while you were working as part-time bookkeeper? [200] A. No.

Q. In other words, you did no reconciliation after you left full-time employment?

A. I may have done a few times. I am not sure.

Q. And the only thing you know about payments of these taxes is what you say you read in the newspapers? A. That he had paid the tax.

Q. When did you stop work as a full-time employee? A. February, 19——

Q. When in February?

A. I probably stopped at the 14th, if I remember right.

The Court: Is this a convenient place to interrupt your cross-examination?

Mr. Hoddick: I think so, your Honor.

The Court: Ladies and gentlemen of the jury, again, before excusing you, you are instructed not to discuss this case with anyone, allow no one to discuss it with you, avoid hearing or reading anything about it, and form no opinion about it. You are excused until 9:00 o'clock tomorrow morning.

(The jury leaves the courtroom.)

The Court: The Court will recess until 9:00 o'clock.

Mr. Crumpacker: Your Honor, may I at this time, I just want to mention that I have a witness coming from Kauai—in fact, she is here—but her testimony, I didn't want to take until the end of Mr. Watanabe's. But since they are not [201] going on tomorrow afternoon, I want to ask if we could put her on prior to finishing cross-examination of Mr. Watanabe tomorrow, or unless the cross-examination is completed before noon, I would like to have ample time to get her on and off before noon.

The Court: If necessary, we will stay on after noon, not later than 12:30. Will that take care of your problem?

Mr. Crumpacker: Well, I hope so.

Mr. Hoddick: I just asked counsel what the name of the witness was.

Mr. Crumpacker: Janet Yamamoto.

Mr. Hoddick: We don't have any objection, your Honor, if he wants to withdraw the present witness.

The Court: Well, I prefer not to call witnesses out of order unless it is absolutely necessary. We will see how cross-examination goes, and if necessary, he can call her out of order later on in the morning.

Mr. Crumpacker: It shouldn't take more than one hour for her direct and cross, I would estimate.

The Court: That is one of those estimates.

Mr. Crumpacker: Well, her testimony should be brief, but I don't know.

The Court: Court will adjourn until 9:00 o'clock tomorrow morning.

(The Court adjourned at 4:00 p.m.) [202]

Honolulu, T. H., November 28, 1956

(The trial resumed at 9:00 a.m.)

The Clerk: Criminal No. 11072, United States of America, Plaintiff, versus Daniel L. Abdul, Defendant, for further trial.

Mr. Hawkins: Ready for the defense, your Honor.

Mr. Crumpacker: Ready for the government.

The Court: Very well. The record will show the jury is present, the defendant and his counsel. Mr. Watanabe.

KATSUYOSHI WATANABE

a witness on behalf of the Plaintiff, having previously been sworn, resumed and testified further as follows:

Cross-Examination
(Continued)

By Mr. Hoddick:

Q. Mr. Watanabe, what is your background as far as your work as a bookkeeper is concerned?

A. Well, I was employed at the Island Radio.

The Court: You will have to keep your voice up. Let's start off strong this morning and keep on going that way.

A. (Continuing): Employed at the Island Radio for about three years.

Mr. Felzer: If the Court please, I still can't hear.

A. (Continuing): I was employed at the Island Radio [203] Company for about three years.

Q. (By Mr. Hoddick): That was before you went to work for Home Furniture Company, Limited?

A. Yes, sir. No; that is, the bookkeeping was back in '48 up to 1950, I believe. I was working at the Easy Appliance Company about a year. I wasn't a bookkeeper, though. I was a service manager at the time.

Q. Have you had any formal education in bookkeeping or accounting?

A. I went to the Galusha Business College.

Q. And you studied bookkeeping there?

(Testimony of Katsuyoshi Watanabe.)

A. Accounting; yes, sir.

Q. Have you ever practiced as a public accountant? A. No, sir.

Q. But you have served as a bookkeeper both with the Island Radio and with the Home Furnishings Company, Limited? A. Yes, sir.

Q. Have you had any other bookkeeping experience? A. No, sir.

Q. How many hours did you put into the study of bookkeeping and accounting at the Galusha Business College?

A. One whole school year, sir. That was from September to graduating in August.

Q. And what year was that?

A. '46 to '47. [204]

Q. Home Furnishings Company, Limited, also had a firm of auditors, did it not? A. Yes, sir.

Q. Lemon and Hough? A. Yes, sir.

Q. And they would come in and review your books and your records? A. Yes, sir.

Q. Approximately how often?

A. They would come in once a year at the end of the year. But also, if I had any question, of course, I could call the auditors any time.

Q. And did you do that occasionally?

A. Yes, sir; I did.

Q. You worked fairly closely with them, did you not? A. Yes; I did.

Q. And, generally speaking, they didn't complain about the way you were discharging your

(Testimony of Katsuyoshi Watanabe.)

duties? They were satisfied with the way you were doing it?

A. I think they were satisfied, sir.

Q. You don't remember any particular complaint on that score?

A. No; no complaint at all, sir.

Q. And generally you kept your bookkeeping up day by day? You didn't let it get behind you, did you? [205]

A. No, sir.

Q. In other words, you worked quite diligently at the job?

A. I believe so.

Q. When you testified yesterday concerning the keeping of payroll records and the making of journal entries in the account to which you credited or debited the entries——

A. Yes, sir.

Q. ——all of those things were done in accordance with the normal principles of bookkeeping and accounting?

A. Yes, sir. It was the normal procedure with the Home Furniture Company.

Q. But there wasn't anything unusual about the way these functions were discharged at the Home Furnishings Company, Limited?

A. I was following instructions, sir.

Q. Well, you were also applying the principles which you had learned in your course at Galusha Business College, weren't you?

A. Yes, sir.

Q. You were asked some questions yesterday by Mr. Crumpacker concerning the status of the bank account of the Home Furnishings Company, Limited?

A. Yes, sir.

(Testimony of Katsuyoshi Watanabe.)

Q. And you drew some distinction between an account that [206] is overdrawn and a situation that prevails when you have funds available? Would you advise the jury and myself again as to what that distinction is?

A. Well, the bank, as far as the bank balance in our books, it was heavily overdrawn and we wrote several checks even though there was no funds in it. Our disbursements was much greater than the receipts.

Q. By that you mean that the total of the checks outstanding was greater than the total of the balance shown on the bank statement?

A. No; in the books, in the ledger. In the bank account with the bank, we had some balances in the bank.

Q. Yes, but didn't you consistently have a greater total of checks outstanding or almost always have a greater total of checks outstanding than you had balance in the bank? A. Yes, sir.

Q. So that if a check were to be drawn for a particular purpose under those circumstances and were to go through, to be negotiated——

A. Yes, sir.

Q. ——and other checks had been negotiated before it was—— A. Yes, sir.

Q. ——there was every possibility that that check would bounce, wasn't there?

A. Yes, sir; they would have. [207]

Q. And, as a matter of fact, that is exactly what

(Testimony of Katsuyoshi Watanabe.)

happened in connection with Plaintiff's Exhibit No. 6, this check for \$1,794.36?

A. Yes, sir, that is exactly what happened.

Q. In other words, when this check was drawn not only was the bank account overdrawn but also there were insufficient funds available to cover the check?

A. Right.

Q. You know, don't you, that to draw a check against an account that has insufficient funds and negotiate it is a violation of the Territorial statute?

A. Well, I didn't sign the check. I think the person who signs the check——

Q. No; but I say that to do that is a violation of the Territorial statute?

A. I don't know.

Q. You don't know?

A. I don't know actually.

Mr. Hoddick: May I have just a moment?

The Court: Yes.

Mr. Crumpacker: Your Honor, I see defense counsel referring to some books. If this witness is to be cross-examined on the books, I would appreciate an opportunity to examine them myself, not having had a previous opportunity.

The Court: There is nothing pending before the Court. [208] I have no idea what counsel are examining.

Q. (By Mr. Hoddick): In your testimony yesterday with reference to the funds being available, it would also be subject to the contingency that there weren't a greater number of checks or so

(Testimony of Katsuyoshi Watanabe.)

many checks outstanding that those funds would have been exhausted, is that true?

A. Yes, sir.

The Court: I couldn't hear your answer.

The Witness: Yes.

Mr. Crumpacker: Your Honor, I didn't hear the question. May I have the question read?

(The reporter read the last question and answer.)

Q. (By Mr. Hoddick): And again referring to Exhibit 6, this is an example where the funds were exhausted? A. Yes, sir.

Q. Well, as of now you are not prepared to state whether there were regular sufficient funds available to pay these taxes or not, are you, from your recollection?

A. Well, Mr. Hoddick, as I said before, he was given a regular statement of the daily summary. If he comes to me and wants certain checks, I will type it out.

Q. As a matter of fact, Mr. Watanabe, Mr. Abdul was even more careful than that. He got a daily statement from the bank, did he not, giving what his balance was on that particular day? [209]

A. You mean from the bank?

Q. Yes.

A. He gets the balance from the bank at the end of the month, the statement.

Q. And didn't he regularly communicate himself or through you with the bank to check as to

(Testimony of Katsuyoshi Watanabe.)

what his daily balance was?

A. That wasn't a normal practice, though.

Q. You recall it being done from time to time?

A. A few times.

Q. Do you recall having a conversation with me on Friday, I think, of last week, Thursday or Friday?

A. Yes, sir.

Q. At your office over at the Trading Center?

A. Yes, sir.

Q. And do you recall advising me at that time that there were daily statements obtained from the bank as to what the balance was?

A. No.

Q. If you did so advise me, that would be an error, that was not correct?

A. I don't believe I said that, Mr. Hoddick.

The Court: Keep your voice up.

Q. (By Mr. Hoddick): Then I must have misunderstood you?

A. I believe so.

Q. You testified that with reference to certain accounts [210] that were in transit, that the contracts——

A. Contracts?

Q. ——that were sent to the mainland for discount purposes——

A. Yes, sir.

Q. ——and represented monies to be received by the Home Furniture Company, Limited, if they were accepted as discount accounts——

A. Yes, sir.

Q. ——and you testified that these sums when deposited directly or automatically, I believe your phrase was, in the Bank of America on the west coast——

A. Yes, sir.

(Testimony of Katsuyoshi Watanabe.)

Q. —when the contracts were accepted by the discount house? A. Yes, sir.

Q. Now, is it not true that the account with the Bank of America on the west coast was closed in 1952?

A. Exactly when it was closed, Mr. Hoddick, I don't recall, but it was attached. I believe it was attached.

Q. But the bank account was not used by Home Furniture Company, Limited, during the years 1953, '54 or '55, was it, for purposes of accepting deposits from the discount house?

A. I believe it was transferred to another bank.

Q. And it was transferred to a bank here in the Territory? [211]

A. Locally, because I believe it was attached.

Q. And consequently you not only had to wait for the accounts to get down there and to be accepted by the discount house but you also had to wait for the receipts to return from the west coast to be deposited here?

A. No; it goes further than that, Mr. Hoddick. The finance people stopped taking our accounts one time. What time exactly it was, I don't know. I can't recall. The reason is that—

Q. Just one second. I am going to object that your answer is not responsive.

Mr. Hoddick: Will you read the question to the witness?

(The reporter read the last question.)

(Testimony of Katsuyoshi Watanabe.)

Q. (By Mr. Hoddick): Is that correct?

A. Yes, sir. There was a schedule, we would receive the schedule.

Q. You mean the discount house would send Home Furniture Company, Limited, a schedule of the accounts which they had accepted?

A. Accepted.

Q. And how much was on the way?

A. How much was deposited, not on the way, deposited.

Q. When they accepted the contract, did they send the money directly to Home Furniture Company? [212]

A. After it was closed and attached, then they sent it back to here.

Q. We are talking about the years 1953, '54 and '55, Mr. Watanabe.

A. I don't recall what year it was but after it was attached it was sent back.

Q. It was sent to Home Furniture Company?

A. To Home Furniture Company.

Q. You got a check for the total of the contracts they had accepted?

A. Not the total contracts. The net proceeds.

Q. Well, eliminating the discount?

A. All right.

Q. And then that check in turn was deposited by you in your bank account here?

A. Locally, yes, sir.

Q. You testified concerning a manila folder?

A. Yes, sir; that Mr. Abdul kept in his desk,

(Testimony of Katsuyoshi Watanabe.)

and in which he placed certain checks which were not put through for collection, not sent through for payment.

Q. But you remember such a folder?

A. Oh, sure; definitely.

Q. Now, that was in Mr. Abdul's kuleana, wasn't it? You didn't have anything to do with the management of it? A. No. [213]

Q. And what checks were in there at any one time, or how much they totaled to is something that you do not know?

A. Well, our bank statement showed. I mean, the reconciliation showed that we had at times ten to fifteen thousand dollars outstanding and a good bulk of it was in the folder.

Q. Did you ever go through the folder and total the checks that were in there so you knew how much was in the folder and how much was outstanding?

A. Yes, sir. In fact, he sometimes would bring the folder to me and said, would you make a list for me what this would total out to, what was actually outstanding. He would bring it to me and he would ask me to make him a schedule on that.

Q. And how many times did he do that and when?

A. Well, I can't recall when it was, but I will say a few times.

Q. A few times during all the time that you worked for him? A. Yes, sir.

Q. What do you mean by a few, a couple?

A. No. I would say about a half a dozen.

(Testimony of Katsuyoshi Watanabe.)

Q. About a half a dozen times? And when was the last time that he asked you to do that?

A. That was in '54, I believe.

Q. Do you know when in '54? [214]

A. No; I don't recall exactly what month it was. Some time in '54.

Q. Do you know approximately? Was it in the summer? A. I can't recall, sir.

Q. Just some time in '54?

A. Some time in '54.

Q. You have no recollection? Isn't it the fact, Mr. Watanabe, that the 941 quarterly tax returns for the first two quarters of 1955 were prepared by Miss Nogami? A. I prepared those forms.

Q. You are sure you did?

A. I got the figures.

Q. You are certain that Miss Nogami didn't do it?

A. Unless she had copied from my duplicate.

Q. And do you recall testifying yesterday that these forms for the first quarters of 1955 were placed together with a prepared check on Mr. Abdul's desk for signature?

A. I did not say that. There was no checks attached to it. I mentioned that there was a note attached to the forms.

Q. But you attached no checks?

A. No checks.

Q. Do you know whether Miss Nogami prepared a check to go along with the forms?

A. I don't recall. I don't remember.

(Testimony of Katsuyoshi Watanabe.)

The Court: Will you please read the question and [215] answer?

(The reporter read the last question and answer.)

Q. (By Mr. Hoddick): Mr. Watanabe, when I talked to you the other day, do you recall mentioning this folder to me at that time?

A. I believe I did.

Q. And do you recall my asking you what was contained in that folder?

A. Yes; I think—yes; I believe you did.

Q. And do you recall telling me that this was, in substance, that this was in the nature of a hold-back folder and that Mr. Abdul frequently put checks in there rather than send them for payment?

A. Yes, sir.

Q. Because he lacked sufficient funds to cover them? A. Yes, sir.

Q. And you further recall my asking you whether there was included in this folder checks for payment of the federal withholding taxes?

A. I believe you asked me.

Q. And you told me that there were some checks for the Internal Revenue Service in this folder?

A. Yes, sir.

Q. And I asked you whether you knew whether they were all the checks there for the Internal Revenue Service for these [216] periods, that is, first three quarters of '54 and two quarters in '55 and

(Testimony of Katsuyoshi Watanabe.)

the last quarter of '53, and you said that you did not know?

A. I am not sure. I don't recall saying that I wasn't sure. I wasn't sure especially of the '55, because I remember not making out the checks, the '55 checks, Mr. Hoddick.

Q. You are not sure today just how many or which checks to the Internal Revenue Service were enclosed in that folder, are you?

A. The ones that I had made I definitely seen those checks. Those that I had not made, I haven't seen at all.

Q. You mean all of the checks which you made payable to the Internal Revenue Service were in that folder? A. At the time I left, yes.

Q. You are not speaking of all the checks that you made during the entire time that you were employed by Mr. Abdul, are you?

A. No; the checks were stapled to the forms at the time I left.

Q. And that was a process which you had followed from the time that you started, wasn't it?

A. Yes.

Q. Well, the checks that were made up in the beginning were not put in the folder or kept in the folder?

A. When you said beginning, what beginning is that? [217]

Q. I am trying to find out from you as to what checks you saw in that folder that had been made

(Testimony of Katsuyoshi Watanabe.)

payable to the Internal Revenue Service and not sent through for collection, which ones?

A. '54. I have seen those.

Q. All of '54?

A. Yes; I have seen the '54's.

Q. All four quarters of 1954?

A. Also the new check, the Central Pacific Bank, too.

Q. Also the which?

A. You see, in '54 I made a new batch of checks to replace the old ones. I have seen the old ones and I also saw the new ones.

Q. What did you do with the old one?

A. That was voided.

Q. What did you do with them?

A. I left it in the folder.

Q. Did you see any other checks in that folder aside from the ones covering the four quarters of 1954?

A. I did see the ones in '53, the end of the quarter.

Q. You are talking about the last quarter?

A. Fourth quarter, yes.

Q. You made quite a bit of testimony yesterday about, you testified yesterday to making duplicates from the copies of the original 941 returns?

A. Yes, sir. [218]

Q. Do you recall that? A. Yes, sir.

Q. And the duplicates which you made, the duplicate originals, were exactly the same, were they not, as the copies which you took them from?

(Testimony of Katsuyoshi Watanabe.)

A. Right.

Q. Which means that the duplicate originals were exactly the same as the original originals?

A. It should be exact.

Q. And those returns were made up from the regular books and records of the corporation?

A. Yes, sir.

Q. As a bookkeeper and as an accountant, you were satisfied that they were entirely accurate?

A. I was satisfied when the auditors made the audit, sir. I wasn't satisfied until the audit was made at the end of the year, sir.

Q. Well, you had done the job and you had done it to the best of your ability, that's correct, isn't it?

A. Yes, sir.

Q. And when the auditors audited it, it made you feel secure? A. Yes, sir.

Q. You testified to having visits from a Miss Burns of the Internal Revenue Service? [219]

A. Yes, sir.

Q. And I assume that you gave her access to these same books and records from which you had prepared the returns?

A. I gave her, after I had consulted Mr. Abdul, as I previously said—I always went out to see Mr. Abdul for any of the information as to release——

Q. But information with reference to the tax liability of Home Furniture Company, Limited, for withholding taxes—— A. Yes, sir.

Q. —that was always accurately available in books and records of the company, wasn't it?

(Testimony of Katsuyoshi Watanabe.)

A. When I was there, yes.

Q. You are including when you were there on a part-time basis as well as your full-time work?

A. No; when I was there full time.

Q. What you mean, then, is up to February of some date of 1955? A. Yes, sir.

Q. And this accurate information relative to the liability—this accurate information was received—this accurate information relative to the withholding tax liability of the Home Furniture Company, Limited, was available to the representatives of the Internal Revenue Service, was it not?

A. It was available.

Q. With reference to the return for the last quarter of [220] 1954, when did you prepare that return? A. Some time in January, sir.

Q. Do you recall when in January?

A. It was before the 31st. In other words, it was prepared for the due date.

Q. When you prepared one of these returns, you would type the date in at the time that you prepared it?

A. Sometimes I did; sometimes I forgot.

Q. Well, I hand you Exhibit No. 8 and ask you if the date January 19, 1955, that appears there was typed in by you?

(Handing a document to the witness.)

A. You are asking me whether I typed this date here?

Q. That's right.

(Testimony of Katsuyoshi Watanabe.)

A. If you ask me if I did, I am not sure, Mr. Hoddick.

Q. Well, did you usually type up the forms or did you just do a rough draft of them and then would the secretary type them?

A. Well, actually this is how I did it, Mr. Hoddick: I made a rough draft first; then I would copy it on this 941, there were times when Miss Yasuda had asked me, she asked me if she could type that for me because she did the typing before for the former bookkeeper, so I had mentioned to her that it was all right, that I could do it, that she could do it.

Q. Would you then, if it were typed by the secretary rather than by yourself, would you then review the copy that [221] had been typed by the secretary to make sure that it was accurate?

A. Yes, sir.

Q. So, regardless of whether you typed it or whether the secretary typed it, the date which appears on the face of the form——

A. Yes, sir.

Q. ——would be the date when the typing was done, is that correct, or when it was submitted to Mr. Abdul for signature?

A. This is the day I would have typed it and submitted it to Mr. Abdul.

Q. In other words, in preparing these forms, you didn't make them up some time in February and then date them back to January 19, did you?

A. No; because I would make a check. I would draw a check against it, too, at the same time.

(Testimony of Katsuyoshi Watanabe.)

Q. What I am getting at is that the date that appears on the 941 represents the date within a day one way or another when the job was actually done?

A. Yes, sir.

Q. You testified yesterday that a check was prepared in connection with this Exhibit No. 8?

A. That is the quarter of '54?

Q. That's right; last quarter. [222]

A. Yes, sir.

Q. And that check and the form were placed together on Mr. Abdul's desk? A. Yes, sir.

Q. And do you recall seeing him put this form and that check in his manila folder?

A. I haven't seen it, but I have seen it in there many times.

Q. You saw this in there many times?

A. Yes.

Q. How many times? A. The forms?

Q. No; I am talking about this form, this Exhibit No. 8.

A. Well, I have seen it—let's see—at least half a dozen times.

Q. In the manila folder? A. Sure.

Q. And over how long a period of time did you see it? Half a dozen times in the manila folder?

A. Within two months.

Q. Over two months?

A. Within two months.

Q. Well, was it half a dozen times over two months or within the first two weeks of the two months?

(Testimony of Katsuyoshi Watanabe.)

A. Within the first week of two months. I would say. [223]

Q. You looked in that? You looked in that folder six times during the first week of the two months?

A. Well, I believe so, because he had it all scattered at times, scattered on his desk.

Q. What you meant to say was that you saw it in the folder over a period of a week and you saw it approximately six times in that folder during the week, is that correct?

A. Yes; I would say I have seen it.

Q. Pardon? A. Yes.

Q. Was it your practice to have reference to that folder, that would be every business day of the week, six times? A. It was on his desk.

Q. I understand.

A. If you had seen his desk with papers on it the way he had it, it was always scattered and we——

Q. My question was whether it was your practice to look at this manila folder six times during the period of a week?

A. Well, in fact, what I did is when it was scattered, and I felt that when I was responsible in that office, when I saw it scattered what I did is, I clipped it together and put it in the folder.

Q. You put these things in that folder, too, did you? A. When it was scattered, yes.

Q. You don't know whether he had it in the folder or [224] not but you would see it on his desk and you would pick it up and put it in the folder?

(Testimony of Katsuyoshi Watanabe.)

A. If I would see the checks were scattered.

Q. This was his holdback folder, was it?

A. Yes, sir.

Q. How long did this Exhibit No. 8 stay in that folder? A. From the time that I prepared it.

Q. Until when? A. Until I left.

Q. Until you left? A. Yes, sir.

Q. And that is some time in the middle of February of 1955? A. Yes, sir.

Q. You are sure of that?

A. I believe so. I am sure of that.

Q. Do you recall testifying earlier this morning that the last time you looked through that folder was in 1954 some time and you couldn't recall the date? A. Yes; I believe I said that.

Q. And you realize this return was prepared on January 19, 1955? A. Yes.

Q. So you made a mistake this morning when you said the last time you looked through the folder was in 1954? [225]

A. Well, if that is what you call it.

The Court: I can't hear.

A. (Continuing): I mean, I may have been a little puzzled on that.

Q. (By Mr. Hoddick): Well, you made a mistake? That's about the size of it?

A. I made a mistake, yes.

Q. And when you say that this was in the folder and remained there until the time that you left, which was some time around the middle of February, 1954—and you will notice that this was filed

(Testimony of Katsuyoshi Watanabe.)

with the Internal Revenue Service on February 2nd, 1955—that is another mistake?

A. You are sure this is not the duplicate, though?

Q. It was filed on February 2nd, '55, wasn't it?

A. It says received on February——

Q. With remittance?

A. ——with remittance.

Q. So that maybe this one wasn't held in the folder? A. It was maybe held up to January.

Q. But as to whether it was held until the time that you left, you are not sure?

A. Maybe not until the 15th, February 15th.

Q. As a matter of fact, Mr. Watanabe, you are unable to testify now from your own knowledge as to what checks were in that folder at any particular time? You just don't remember? [226] There were so many that went through there over such a long period of time?

A. I remember many. I have seen my reports in there.

Q. I understand that. But what reports and when you saw them, you can't tell us now, can you, any more than you could tell me the other day when I was in your office? A. I could.

Q. You could? A. Sure.

Q. You have a better recollection today than you did the other day?

A. I think it is the same.

Q. How many times have you discussed this case

(Testimony of Katsuyoshi Watanabe.)

and looked at these exhibits with the United States attorney before taking the stand?

A. The first was during the jury trial.

Q. The grand jury?

A. The grand jury trial. Then on Sunday.

Q. You worked with him Sunday on these exhibits?

A. Yes, sir. I mean, he showed them to me.

Q. And it was after you talked with him Sunday and you looked through all of these exhibits that your recollection was refreshed that they were all held in this folder that Mr. Abdul had in his desk?

A. No; I won't put it in that sense. [227]

Q. How would you put it?

A. That I have seen reports. I have seen those that I had prepared. I have seen it in the folder, the '54 quarter.

Q. But what reports and how many reports or when, you have no distinct recollection, do you?

A. How many reports, as I said, all of the reports that I prepared which was accompanied by the check was in the folder, Mr. Hoddick. He had it in the folder. He actually had it in the folder.

Q. With reference to those 941 forms that you examined yesterday, it was your testimony, was it not, that those that appeared to have been done on an Addressograph were mailed to the company from the District Director's office? A. Yes, sir.

Q. And where did the ones that do not appear to have been done by the Addressograph come from?

(Testimony of Katsuyoshi Watanabe.)

A. Probably one of the agents must have brought those over.

Q. Did you come down ever to the Federal Building here to the room where those forms are available and get any blanks to use?

A. Never did.

Q. Do you know whether anybody else from Home Furnishings Company ever did?

A. I don't remember, sir. [228]

Q. This notes payable account that was maintained by the corporation, you knew, did you not, that that represented, started off with a substantial sum of money that Mr. Abdul had borrowed from the corporation for the purpose of purchasing all of the corporation's stock?

A. I don't think I was told that by Mr. Abdul, sir.

Q. You don't remember being told that?

A. No.

Q. And you are certain that the balance of that notes payable account increased from '53 to the end of '54?

A. Yes, sir.

Q. And it is your testimony it went up from about \$15,000 to \$25,000?

A. Yes, sir.

Q. And, of course, you don't know what its status was at the end of 1955?

A. No; I don't.

Q. Would not the figures, roughly \$21,800 at the end of '53 and \$23,700 at the end of '54, inclusive, show what the facts were——

Mr. Crumpacker: Your Honor, I object to the

(Testimony of Katsuyoshi Watanabe.)

questioning of this witness on the basis of the information which apparently Mr. Hoddick has gotten out of the books. The best information certainly would come from books. And if Mr. Watanabe kept the books he should be given an opportunity [229] to refresh his memory thereby.

Mr. Hoddick: We are going into his credibility.

The Court: If that is an objection, the objection is overruled.

Q. (By Mr. Hoddick): Did you hear my last question, Mr. Watanabe? A. Yes, sir.

Q. And doesn't this sound like it was more accurate, \$21,800 at the end of '53 and \$23,700 at the end of '54 than the fifteen- and twenty-five-thousand-dollar figure which you gave?

A. I don't remember, sir.

Q. Isn't it true, Mr. Watanabe, that this is just another case of where you can't be certain that your recollection is absolutely accurate?

A. Well, I figured on the basis that it was at the time I left, it was about in the twenties. So I thought that was about 25.

Q. At the time you left?

A. So I thought it was pretty close. I mentioned that it was 25.

Q. But your recollection of what it was at the end of '53 as fifteen, you have no certainty that that is right?

A. I just thought it was that amount, sir.

Q. It is a sort of a figure you picked out of the air? [230] Is that right?

(Testimony of Katsuyoshi Watanabe.)

A. I won't exactly put it that way. I mean——

Q. How would you put it?

A. ——well, I figured out that at the time I left it was about 25, sir. I took ten thousand that he was approximately, that he would be drawing out.

Q. Getting back to this subject of the funds available in the overdrawn bank accounts——

A. Yes, sir.

Q. ——isn't it true, Mr. Watanabe, that for month after month after month Mr. Abdul did not cash his paychecks because there were insufficient fund to do so?

A. Yes; he had his payroll checks in the safe.

Q. And isn't it true that he also had the payroll checks to his wife held in the safe, or many of them, because there were insufficient funds to cash them?

A. Some of them, yes.

Q. So the effect of the others—you said that the payroll checks were divided in two. There was one \$800 that was used to apply against the notes payable and another?

A. Yes, sir.

Q. And another \$800 that he could cash or he would, that he was going to?

A. Yes, sir.

Q. What happened in substance was that you had a book [231] transaction where he was issued an \$800 payroll check and the balance that he owed the company was reduced by \$800 as far as that one check is concerned?

A. Reduced by the net figure.

Q. Whatever the net figure was?

A. Yes.

Q. That is less taxes?

A. Yes, sir.

(Testimony of Katsuyoshi Watanabe.)

Q. And the rest? A. Yes, sir.

Q. So there was no money that came into the corporate account or went out of the corporate account by virtue of that \$800 check that was regularly applied to the net proceeds, which were regularly applied against the loan? A. Yes, sir.

Q. And as to the other \$800 check you do remember that he had quite a number of them in his safe because there were insufficient funds available?

A. Yes, sir; he did.

Q. You testified yesterday with reference to the returns that were prepared for the first and second quarters of 1955. I think they are Exhibits 9 and 10. I will hand them to you so that you can have them available. (Handing documents to the witness.) That had you prepared the returns and that you made a note on a sheet of paper that you stapled to them? [232] A. Yes, sir.

Q. You said that the check should accompany the form, and give the amount of the check, to whom payable and when due? A. Yes, sir.

Q. That is the information that you put on these? A. On the originals.

Q. On the originals? A. Yes, sir.

Q. You definitely remember putting on the original of each of those the statement that the check should accompany the form? A. Yes, sir.

Q. You have no doubt about that at the present time?

A. I believe I did put a note on it.

(Testimony of Katsuyoshi Watanabe.)

Q. And was that consistently the advice that you gave to Mr. Abdul with reference to these forms 941?

A. Well, I wasn't there to make the check out, Mr. Hoddick.

Q. No, but when you were there on the earlier returns, did you consistently advise Mr. Abdul that he should send the check along with the form?

A. Not consistently. I told him one time only, Mr. Hoddick, only once. I told him that if he didn't have the funds that at least he should mail in the reports.

Q. You told him that once but generally you told him, [233] as you stated, as you stated in writing on the note, as you stated on the note you attached to those forms that the check should go in with the form?

A. Well, it was due.

Q. I am not asking whether it was due. I am asking you if that is what you told him?

A. Yes, and it needed his signature.

Q. And the check should go with the form?

A. Yes, sir.

Q. Do you recall receiving a telephone call from Mr. Abdul in 1955 during the course of which he asked you to come in and show Miss Nogami how to make these reports, these 941 forms, so they could be gotten in in time?

A. Yes, I recall.

Q. And did you come in and show Miss Nogami how to do that?

A. Yes, I did.

Q. And does that assist your recollection as to

(Testimony of Katsuyoshi Watanabe.)

whether you or she prepared these reports for the first two quarters of 1955?

A. Mr. Hoddick, I definitely remember I prepared the first two quarters.

Q. Both of them or just the first one?

A. Both of them.

Q. Correct me if I am in error, Mr. Watanabe, but I [234] recall your testifying yesterday that with reference to the fourth quarter of 1953 you did not prepare a duplicate as no forms were available at that time.

A. Yes, sir.

Q. Now, by that you don't mean that copy was not available in the office of the Home Furniture Company, Limited, do you?

A. That is what I mean. It wasn't in our office. It was available for the District Director.

Q. But isn't it the fact that the form which was used during 1953 had become obsolete and it wasn't possible to obtain another '53 form?

A. No.

Q. Isn't that so?

A. No. You see, I remember that we were supposed to have gotten four copies of the forms.

Q. And you only got three?

A. Only got three.

Q. For the year 1954?

A. Right.

Q. You didn't receive one that had marked on it 1953?

A. Never did.

Q. But you still had in the office of Home Furniture Company, Limited, in your retaining folder, the retaining copy of that fourth quarter? [235]

A. Yes, sir.

(Testimony of Katsuyoshi Watanabe.)

Mr. Hoddick: I have no further questions.

Redirect Examination

By Mr. Crumpacker:

Q. Mr. Watanabe, in connection with the questions asked you by Mr. Hoddick about this folder in which there were outstanding checks——

A. Checks.

Q. ——also with the questions he asked you with regard to writing of checks on insufficient funds——

A. Yes, sir.

Q. ——what did you mean by checks which were outstanding?

A. Well, checks that are outstanding is checks that has not been cashed by the payee or hasn't gone through the bank for payment.

Q. Do you mean when you refer to outstanding checks, do you mean they are checks that have been signed and mailed or checks which have been prepared by you, entered in your books, and placed on Mr. Abdul's desk for signature? A. Yes, sir.

Q. Well, which one do you mean?

A. Well, those checks that he had in his folder are checks that we had prepared, and when I say 'we' it is because Miss Yasuda prepared some of those checks, those checks were recorded in the books which was never sent to the bank, to the [236] payee.

Q. So when you refer to the fact that there were insufficient funds, there were insufficient funds in the bank to cover all outstanding checks, you were referring to the checks—— A. All of the checks.

(Testimony of Katsuyoshi Watanabe.)

Q. —that were not yet sent out by Mr. Abdul?

A. Yes, sir.

Q. As well as others which may have been sent out?

A. Yes, sir.

Q. Now, I understood from your earlier testimony that this holdback, or from your cross-examination, that this was thought of as a holdback file, that it was obligations where checks had been prepared but since there weren't enough funds at the moment to send those out they weren't sent out, is that right?

A. Not for all of the checks.

Q. Not for all of them?

A. Yes, sir.

Q. Now, my question to you is, as of the end of each quarter when the 941's which you had prepared were placed upon his desk, were there sufficient funds on every occasion to pay those if he had so elected to pay them?

A. I can't actually recollect whether at the time there was actually that amount of money.

Q. Let me ask you this: Do you recall the average amount [237] of money disbursed monthly from the corporation during this period? In other words, how much money?

A. How many checks we wrote?

Q. How many checks were actually gone through? In other words, I presume that that figure would be derived from the amount of the receipts because you only paid as much as you received. With that in mind, how much, if you can say, on an average or if there is no average give it to us from beginning with '54 and extending through the mid-

(Testimony of Katsuyoshi Watanabe.)

ble of '55, if you know, what was the average amount of money or how did it range? Did it increase or decrease from month to month during that period?

Mr. Hoddick: I am going to object to the question as having about four different parts in it and also calling at this time for a conclusion on the part of the witness without an adequate foundation being laid.

The Court: If that question were read to you, Mr. Crumpacker, I think you will have great difficulty——

Mr. Crumpacker: Well, I will rephrase it.

The Court: You will rephrase it after the first recess. Ladies and gentlemen, you are excused for a ten-minute recess.

(Jury leaves courtroom at 10:00 a.m.)

Mr. Hoddick: May it please the Court, the arrangements that Mr. Felzer had spoken to the Court about before are [238] set to go forward this afternoon, I am advised, and we would like to ask the Court's indulgence by way of adjourning the case at noon instead of at four.

The Court: Very well. You might have that last question read back to you. It will take two or three minutes.

Mr. Crumpacker: I thought it was a bad one.

The Court: The Court will stand at recess.

(A recess was taken.)

(Testimony of Katsuyoshi Watanabe.)

After Recess

The Court: Let the record show that the jury is present, the defendant and his counsel.

Q. (By Mr. Crumpacker): Mr. Watanabe, you stated that there was a folder which Mr. Abdul held on his desk of disbursements, checks held back and not paid. You testified that only certain ones were processed by him and sent out at his selection, you might say. My question to you is, can you state approximately how much money was disbursed monthly by the corporation during the years 1953 and the first half of 1954. I mean in the year 1954 and the first half of 1955.

A. I'm sorry, Mr. Crumpacker, I can't answer that.

Q. Can you give us some kind of a general statement? A. I can't.

Q. You earlier referred to the fact that a certain number of thousands of dollars each year of contracts were discounted, is that right? [239]

A. Yes, sir.

Q. Does that represent or did that represent income to the corporation?

A. Yes, because that contract after discounting meant that he had sold merchandise and had sold the contract to the finance company.

Q. And that, together with the cash receipts?

A. Yes, sir.

(Testimony of Katsuyoshi Watanabe.)

Q. For the payment of furniture represented income to the corporation?

A. Income to the corporation.

Q. Now, with those figures in mind, as you previously testified to, could you give us an estimate of the amount of monies paid out by the corporation during those years? A. No, I just can't.

Q. Do you recall how much money you said was received by the corporation in 1954 by way of discounted contracts?

A. No, not the total amount. I can't, Mr. Crumacker.

Q. You did earlier mention it, did you not, in your direct testimony?

A. That percentage——

Q. No, you gave a figure in hundreds of thousands of dollars.

A. Hundred thousand dollars?

Q. Do you recall what that figure was for [240] 1954?

A. 1954 I believe I said about \$150,000, I believe.

Q. So you know that at least that much money was received by the corporation in 1954?

A. I believe so.

Q. Can you state what the approximate amount of other receipts by the corporation during 1954 were?

A. Other receipts was received through payments from the contract that was already discounted

(Testimony of Katsuyoshi Watanabe.)

which belonged to the finance company which we had collected for the finance company.

Q. Were there any cash receipts for sale?

A. There were some cash sales.

Q. Can you state, give an approximate amount which was received by the corporation as corporate money in addition to the discounted contracts?

A. I can't give you anything, I can't give you any figure, Mr. Crumpacker.

Q. With the \$150,000 which you mentioned in mind, how much of that was disbursed by the corporation during 1954?

A. I have no idea how much was spent.

The Court: I can't hear a word you say, Mr. Watanabe, if you are speaking.

A. (Continuing): I can't remember how much of it was spent, Mr. Crumpacker.

Q. You stated that there was never any surplus in the [241] bank account, is that right?

A. What do you mean by surplus in the bank account?

Q. Well, you stated that the bank balances were maintained more or less just above zero, shall we say, by way of disbursements, is that right?

A. Well, there were some funds, I will say, just above zero. At times there were funds, there were funds.

Q. Can you give us an estimate of how much of that \$150,000 which was received by the corporation in 1954 was paid out by the corporation in

(Testimony of Katsuyoshi Watanabe.)

1954? Was it all or 90 per cent of it or 80 per cent of it or can you give us an estimate?

Mr. Hoddick: Your Honor, I am going to object. The witness has already said twice that he doesn't know.

The Court: He has stated already, Mr. Crumpacker, that he did not know.

Q. (By Mr. Crumpacker): You stated that the account in the Bank of America was closed some time when you were there, is that right?

A. Yes, it was closed.

Q. And after that was closed, where were the contracts discounted?

A. We still discounted with the State Investment.

Q. During the whole time that you were there?

A. No. Then when they stopped taking any contracts, we took it down to the Central Pacific [242] Bank.

Q. But the contracts were discounted the whole time you were there at one place or another?

A. Yes, sir.

Q. Again referring to the manila folder in which these held-back disbursements were maintained, you say you saw the returns and checks which you had prepared in that folder?

A. Yes, sir.

Q. During the time you were there?

A. Yes, sir.

Q. But did you not originally state that when they were first prepared you placed them on his desk for signature?

A. Yes, sir.

(Testimony of Katsuyoshi Watanabe.)

Q. And then who put them in the folder?

A. The folder was originated by Mr. Abdul.

Q. Well, who put them in the folder?

A. He must have done that.

Q. In other words, you put them on his desk and later on you saw them in the folder?

A. Yes, sir.

Q. Presumably you say he put them. At least you didn't put them in the folder, is that right?

A. No, I didn't.

Q. Now, just how many—in order to clarify this and there is some confusion in your cross-examination—how many duplicate returns and for what quarters were made up by you? That is, you [243] know what I mean by duplicates?

A. Yes, new sets.

Q. Second sets.

A. Yes. I was given three sets.

Q. For what quarters?

A. '54 and also——

Q. Which quarters of '54?

A. The first three quarters.

Q. And which ones had been brought to your attention as delinquent at that time?

A. All of it.

Q. Of those three? A. Yes, sir.

Q. Any others?

A. Also the '53, fourth quarter.

Q. How about the last quarter of '54?

A. Yes, sir.

Q. Well, did you prepare a duplicate for that?

(Testimony of Katsuyoshi Watanabe.)

A. I also prepared a duplicate in December, three quarters I prepared.

Q. For three quarters? A. Yes, sir.

Q. You say those are the first three quarters of '54? A. Yes, sir.

Q. My question was, with respect to the fourth quarter [244] of 1954.

A. I also prepared that.

Mr. Hoddick: I object to that—that has been asked and answered.

The Court: I'm not sure that it has. Answer the question. That is the fourth quarter for 1954, is that correct, the fourth quarter for 1954? You prepared that?

The Witness: The originals, yes.

Q. (By Mr. Crumpacker): Let me show you Exhibit No. 8 to refresh your recollection. You say you prepared that original? (Showing a document to the witness.) A. Yes, sir.

Q. Did you ever prepare a duplicate of that one?

A. I remember preparing three duplicates of one particular calendar year and the one for '53.

Q. But not the one you have in your hand?

A. I don't believe I made a duplicate for this.

The Court: I can't hear you, Mr. Watanabe. You will have to keep your voice up.

A. (Continuing): I don't believe I made a duplicate for that.

Q. When you were asked on cross-examination as to the preparation of duplicates, whether or not

(Testimony of Katsuyoshi Watanabe.)

you prepared them exactly as the originals, do you recall that question? A. Yes, sir. [245]

Q. You stated, I believe, that you did. Will you explain what you mean by exactly?

A. Well, I got my retaining copy and just copied it from the retaining copy; whatever was on the original, original retaining copy, is the figures that I arrived at from on the duplicate.

Q. And those you say you prepared in December of 1954, the duplicates?

A. December 27th, I believe.

Q. Now, when you say you prepared them exactly as the originals, does that include the date which you placed on the form?

A. I don't recall the date, sir, whether I typed the first date or the date that I had made the new report on.

Q. You say you don't recall?

A. I don't recall, sir.

Q. Do you recall whether or not you indicated they were copies?

A. I believe I typed the word "copy" on the ones that I had typed.

Q. Now, you were questioned about Mrs. Burns' visit to you——

Mr. Hoddick: Your Honor, just a minute. I call the Court's attention to the fact that Mrs. Burns has returned to the courtroom and ask that she leave. [246]

The Court: Apparently she is now departing.

(Mrs. Burns leaves courtroom.)

(Testimony of Katsuyoshi Watanabe.)

Q. (By Mr. Crumpacker): You were asked if you showed Mrs. Burns the books relative to the tax returns.

A. The retaining copy and also the check record.

Q. And then were asked if the information relative to the preparation of those returns was always accurately available from your books.

A. Yes, sir.

Q. I believe your answer was, well, you were there.

A. Yes, sir.

Q. But you did state, did you not, that you didn't show the books except with the approval of Mr. Abdul?

A. Yes, sir.

Q. When you say the information was always accurately available from the books, you mean to say that the books would show that the taxes had in fact been paid or the form had in fact been sent to the Internal Revenue Service?

A. My records would show that the check was drawn. Whether it was submitted at the time, I didn't have the record. At the time she was in my office, the check had not been returned, canceled by the bank. So that meant that it was still outstanding.

Q. And again when you say still outstanding, it was outstanding as far as your books were concerned? [247]

A. Yes, sir.

Q. And you don't know in whose hands it was outstanding?

A. Well, at the time I couldn't release, was re-

(Testimony of Katsuyoshi Watanabe.)

luctant to release any information. But those reports were in the folder.

Q. At that time they were still in Mr. Abdul's folder? A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. And you were asked if the information in your books was always available to the people from the Internal Revenue Service? A. Yes, sir.

Q. Do you know whether or not any person from the Internal Revenue Service was given an opportunity to fully inspect your books?

A. I don't remember. While I was there no one was there to go through the books fully.

Q. Not while you were there?

A. While I was there, none.

Q. So you don't know at least from your own knowledge whether they were given an opportunity to look at the books? A. Yes, sir.

Q. And they were not given the opportunity by you? A. No. [248]

Q. You were asked if the date which you placed on the tax return was the date on which you prepared it? A. Yes, sir.

Q. Do you recall that? A. Yes, sir.

Q. And you answered, I believe, yes?

A. Yes.

Q. But you stated just now that you are not sure when you made duplicates, whether you put the original date or the date at the time in which you made the duplicate? Can you clarify those two answers?

(Testimony of Katsuyoshi Watanabe.)

A. Well, in typing the duplicates, the new receipt, I can't recall whether I typed in the exact date that I had originally, that I had originated it from, or whether I used the date that was originally typed for the particular day. I mean typed for the particular day.

Q. So you are not certain in every case and particularly in the case at least with respect to the duplicates whether you put the date of preparation on it? A. The preparation date.

Q. Or the original date?

A. Or the original date, sir.

Q. When did you say you went to work for Home Furniture? A. December.

Q. Of '52? [249] A. Yes, sir.

Q. You were questioned about the balance in the notes payable account of Mr. Abdul for the end of the years '53 and 1954. Do you have any recollection as to what it was at the end of the year 1952? A. No, I don't.

Q. With respect to that account of Mr. Abdul's maintained by the corporation, you stated that half of his salary was credited during that period to that account?

A. When you say half, you mean the \$800.

Q. Yes. A. Yes, sir.

Q. And it was indicated that this was merely a book entry by Mr. Hoddick when he questioned you? Now, my question to you is, were there not disbursements paid from that account which were

(Testimony of Katsuyoshi Watanabe.)

charged against it which exceeded the amount credited to it? A. Yes, sir.

Q. During those years? A. Yes, sir.

Q. Including the balance of the salary?

A. Yes, sir.

Mr. Crumpacker: Your Honor, I would like to ask permission to reopen the direct for the limited purpose of having Mr. Watanabe identify some exhibits which I overlooked [250] on the original direct, namely, the remainder of the exhibits which are marked only for identification at this time.

The Court: I will permit it.

Direct Examination

By Mr. Crumpacker:

Q. I show you Plaintiff's Exhibit 15 for identification and ask if you can identify the signatures there? (Showing a document to the witness.)

A. The signature is Mr. Abdul's and the other signature is Mrs. Abdul's.

Q. That being the corporate income tax return for 1953? Now, I show you Plaintiff's 16 for identification and ask you if you can identify the signature on that, being the corporate return for 1954? (Showing a document to the witness.)

A. This belongs to Mr. Abdul.

Q. And I show you No. 17 for identification, being the corporate return for 1955, and ask you if you can identify the signature on that? (Showing a document to the witness.)

(Testimony of Katsuyoshi Watanabe.)

A. This signature belongs to Mr. Abdul.

Q. And I show you Plaintiff's No. 18 for identification, being individual tax return for the year 1953 of Daniel and Katherine Abdul, and ask you if you can identify the signatures on that? (Showing a document to the witness.)

A. The signature belongs to Mr. and Mrs. Abdul.

Q. And I show you Plaintiff's No. 19 for identification, [251] being the 1954 income tax return of Mr. and Mrs. Abdul, and ask you if you can identify the signatures on that? (Showing a document to the witness.)

A. It belongs to Mr. Abdul and Mrs. Abdul.

Q. In Plaintiff's No. 20 for identification, the income tax return for Mr. and Mrs. Abdul for 1955, can you identify the signature on that? (Showing a document to the witness.)

A. Signature belongs to Mr. Abdul and Mrs. Abdul.

Q. Now, you earlier stated that I believe you took up the matter of delinquency of these returns which you received a call on, that is, the 941 which you received a call from agents of the Internal Revenue Service? A. Yes, sir.

Q. Let me ask you, did you receive any other notification of delinquency?

A. We received delinquency notices——

Mr. Hoddick: Just one second. I am going to object to the question, your Honor, as being improper redirect examination.

(Testimony of Katsuyoshi Watanabe.)

Mr. Crumpacker: I merely want to ask him to identify one other exhibit.

Mr. Hoddick: This is still part of your reopened direct?

Mr. Crumpacker: Yes.

Mr. Hoddick: All right. [252]

A. (Continuing): —received delinquency notices for the quarterly returns.

Q. (By Mr. Crumpacker): I show you Plaintiff's Exhibit No. 13 and ask you if you can identify Plaintiff's No. 13 for identification, and ask you if you can identify that? (Showing a document to the witness.)

A. We received forms of this type here for the quarterly delinquency taxes.

The Court: For what?

The Witness: This type of forms.

Q. (By Mr. Crumpacker): Do you recall when that came in?

A. Well, it did come in when the taxes are overdue.

Q. Do you recall how long afterward?

A. Probably about 15 days, I believe.

Mr. Crumpacker: That's all I have on that, your Honor. I would like to reoffer Exhibit 13 for identification.

Mr. Hoddick: Might I ask a few questions on this?

The Court: Yes.

(Testimony of Katsuyoshi Watanabe.)

Cross-Examination

By Mr. Hoddick:

Q. You received this blank form of letter that you refer to? A. Yes, sir.

Q. Would it have writing in ink on the bottom of it?

A. I haven't seen anything—no, no ink writing at all. [253]

Q. And how many of these were received?

A. Well, I got just one from Mr. Abdul.

Q. You got one from Mr. Abdul?

A. Yes. And some of it was placed in the folder.

Q. You mean this same folder that the checks went into? A. Yes, sir.

Q. You refer to one you got from Mr. Abdul and then you say some of them or some of it was placed in the folder. What do you mean?

A. Well, we got it frequently after he probably opened the envelopes, he would stick it in the envelope.

Q. Did you get one about January 15, 1954, on or about February, 1954, covering the last quarter of '53? A. '53?

Q. I will withdraw that. The last quarter of '53 is due on January 31st?

A. January 31st, '54.

Q. And did you receive such a letter on or about February 15, '54?

(Testimony of Katsuyoshi Watanabe.)

A. I may have but I don't recall.

Q. You don't recall.

A. I don't recall.

Q. Did you receive such a letter on or about April 15, 1954? A. I don't recall. [254]

Q. Did you receive such a letter on or about July 15, 1954?

A. I believe I got one in July.

Q. You think you got one for July?

A. Yes.

Q. That is in 1954? A. Yes.

Q. And you are sure that letter was in the same form as this one? A. Yes, sir.

Q. Have you read this one through carefully?

A. Beg your pardon?

Q. Have you read this one through carefully?

A. I haven't read it carefully but I read it.

The Court: Well, read it carefully now.

(Document handed to the witness.)

The Court: Have you read it?

The Witness: Yes.

The Court: Proceed, Mr. Hoddick.

Q. (By Mr. Hoddick): Is that the type of letter which you received on or about July, 1954?

A. Yes, some time in July.

Q. And did you receive such a letter on or about October 15, 1954?

A. I am not sure if I did. I can't recall. [255]

Q. Were you shown any such letter or did you see any such letter on or about April 15, 1955?

(Testimony of Katsuyoshi Watanabe.)

A. No, sir; I don't recall.

Q. Or July 15, 1955?

A. I don't recall, sir.

Q. The only one you have a definite recollection of, then, is the one for July, 1954? A. '54.

Q. And it is your recollection that it was substantially in this form without the ink writing on the bottom? A. Right.

Q. And who was it addressed to?

A. Home Furniture Company.

Q. You said Mr. Abdul gave it to you?

A. Well, it was put in my tray, sir.

Q. You don't know who put it there?

A. I am not sure. I don't recall.

Q. And then you placed it, you gave it back to Mr. Abdul and he put it in his folder?

A. I am not sure if he did, but it was in the folder, sir.

Q. You later saw it in the folder some time?

A. Yes, sir.

Mr. Hoddick: Subject to the deletion of the ink portion on the bottom, your Honor, we have no objection to the [256] receipt of the exhibit.

The Court: That will be deleted from the exhibit and it will be received as Exhibit 13.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 13.)

Mr. Crumpacker: I have no further questions.

The Court: Are there any objections? Did you offer these others?

(Testimony of Katsuyoshi Watanabe.)

Mr. Crumpacker: No, your Honor.

The Court: You did not? Very well. Do you have any recross-examination, Mr. Hoddick?

Mr. Hoddick: Yes, your Honor, I think I may be able to wind it up before the noon hour.

The Court: Before you start, I want to ask a couple of questions and you might want to enlarge on that.

Mr. Hoddick: Thank you.

The Court: Mr. Watanabe, did you ever have a conversation with Mr. Abdul with reference to showing the books of the Home Furniture Company, Limited, to agents of the Internal Revenue Service? Answer that yes or no.

The Witness: No, sir.

The Court: You never did?

The Witness: Never did.

The Court: Did you ever have any authority from him to show the books of the company to the agents of the Internal [257] Revenue Department?

The Witness: No.

Mr. Hoddick: I didn't hear the answer.

The Court: The answer was no. When you prepared the return for the last quarter of 1953, as well as a check in payment the amount shown on that return, can you state whether or not the books of the company reflected such funds in the bank so that the check would be honored if presented?

The Witness: I believe our records showed that it had insufficient funds.

The Court: Insufficient funds?

(Testimony of Katsuyoshi Watanabe.)

The Witness: Insufficient funds.

The Court: Is that the record based on the reconciliation or solely the bank account?

The Witness: The bank account.

The Court: The bank account?

The Witness: Yes.

The Court: And would that be affected by other checks that were then outstanding which you had debited against the bank account?

The Witness: Yes, sir.

The Court: And you did not know whether those checks had been presented for payment or not, the outstanding checks?

The Witness: Yes, sir.

The Court: Did you know? [258]

The Witness: If I knew that the checks were still outstanding, sir?

The Court: That's right.

The Witness: Yes, sir.

The Court: You did?

The Witness: I knew.

The Court: Well, disregarding those checks, then, would there have been sufficient funds to pay the check made payable to the Director of Internal Revenue?

The Witness: Could you tell me how much it was, the check?

The Court: May I have that?

Mr. Hoddick: Exhibit 2, I believe.

The Court: Exhibit 2.

The Witness: That is on the '53?

(Testimony of Katsuyoshi Watanabe.)

The Court: That's right.

Mr. Hawkins: Your Honor, we are not hearing the testimony.

The Court: Beg your pardon?

Mr. Hawkins: I am not hearing the testimony and I am sure some of the jurors are not getting it.

The Court: You will have to keep your voice up. Would you read the last?

(The reporter read the last question and answer.)

The Witness: I believe there was funds. [259]

The Court: There were, you think there were sufficient funds?

The Witness: Sufficient funds.

The Court: So that that check would be honored if presented?

The Witness: Yes.

The Court: May I have Exhibit 4, please? (To the clerk.) Mr. Wantanabe, with regard to Exhibit 4, the quarterly return for the first quarter of 1954, at the time you prepared that return and a check, can you state whether or not there were sufficient funds in the bank so that the check would be honored if presented for payment?

The Witness: I don't believe there were any sufficient funds on this quarter.

The Court: That is because of the outstanding checks which were recorded in your books?

The Witness: No, because I believe the payroll

(Testimony of Katsuyoshi Watanabe.)

was paid out and I don't believe we had enough to cover this amount.

The Court: You state that as your belief. You don't have the figures before you, the records, of course?

The Witness: No.

The Court: Would your answers be similar to the same type of questions relating to the returns for the balance of 1954?

The Witness: Well, in some cases it depends on the [260] receipts of the day. Certain months are good months and certain months are bad in collections.

The Court: Is it your testimony that during the year 1954, that none of these checks would be honored by the bank if they had been presented?

The Witness: At times maybe some would be able to go through. But at the time when it was to be sent in, at the particular point, I am not sure, sir.

The Court: Was it your practice to prepare checks for signature even though there were no funds in the bank to cover the payment of such checks?

The Witness: I wouldn't say it was a practice. You see, what happens is this, that I knew that the checks were being held back, certain checks. And knowing at certain times that the checks he would send in would be honored and thinking that the way he was, Mr. Abdul was sending in those checks, and with the receipts that we were receiving daily, I figured out that it would be sent in.

(Testimony of Katsuyoshi Watanabe.)

The Court: You had no responsibility whatsoever concerning the sending out or the mailing or delivery of checks that were in that holdback file?

The Witness: No, sir.

The Court: Whose responsibility was that?

The Witness: Well——

The Court: If you know. [261]

The Witness: Mr. Abdul did sign the checks he wanted to sign or pay the bills that he wanted to pay. He would make duplicate checks at times when the first one was not received. In fact, he ran the whole business, I would say.

The Court: Is it correct to say that the record of the corporation reflected that these amounts as shown in the quarterly federal tax returns were deducted from the wages of the employees of the corporation?

The Witness: Yes, it was deducted.

The Court: Now, Mr. Hoddick.

Recross-Examination

By Mr. Hoddick:

Q. Mr. Watanabe, would you say that these amounts deducted from the wages of the employees—— A. Yes, sir.

Q. ——as far as the returns are concerned which were promptly, were those on which prompt payment were not made? A. Yes, sir.

Q. What you mean to say is that the employees

(Testimony of Katsuyoshi Watanabe.)

were not paid the amount of the tax that was withheld? A. Yes, sir.

Q. You do not mean to say that the particular dollars were taken out of the pot and put over in another place to be held for payment to the United States, do you?

A. At the very beginning we held it for the—— [262]

Q. By way of depository receipts?

A. Depository receipt.

Q. I am talking about the periods when the returns were delinquent.

A. It was not held. It was not deposited.

Q. So all that happened was that the employee, say, was receiving \$300 and instead of giving him \$300 he got \$350 or whatever it was?

A. Yes, sir.

Q. You testified a moment ago that Mr. Abdul, I think you said, he ran the whole business?

A. Yes, sir.

Q. He signed the checks he wanted to sign and he paid the bills he wanted to pay?

A. Yes, sir.

Q. Isn't it a fact that Mr. Abdul paid the bills that he could pay? A lot of the bills that he wanted to pay?

A. I wouldn't say that, sir. Mr. Hoddick, because can I give you an example?

Q. Go ahead.

A. A creditor would walk in and he would ask for a certain amount of money. He would have made

(Testimony of Katsuyoshi Watanabe.)

a check, he would have made a check maybe six months ago. And he would walk in and he would tell this fellow, oh, we sent a check a long time ago. And it would show, naturally, on my check record that [263] this was transacted. Then he would come to me and say, well, it's funny you didn't receive it. So I will ask my bookkeeper to make a new one and he will make a new one.

Q. Mr. Abdul did not send out checks, as a general rule, Exhibit 6 being an exception, where he felt it would not be honored by the bank he would not send out the checks? Isn't that the long and short of it?

A. Well, there were times when he gave checks and the check was returned.

Q. There were a number of times, weren't there, when he paid and the checks bounced?

A. Sure.

Q. How frequently did that happen during the year 1954?

A. I don't recall, sir. I can't remember how often.

Q. Well, how many returned checks were there, how many returned checks would you get on an average each month during 1954?

A. I can't tell you.

Q. You have no idea? But you can tell——

A. I can tell you maybe a few of the creditors that I believe had a bounced check, if that would help.

(Testimony of Katsuyoshi Watanabe.)

Q. Can you tell us whether it happened infrequently or frequently?

A. Well, it varied actually. Sometimes it was frequent; sometimes it was infrequent. [264]

Q. Would say that these checks sent out to creditors and which were returned, were referred to the maker?

A. Yes, sir.

Q. Did that happen throughout 1954?

A. It happened sometime, it happened in 1954.

Q. All during the year or was it at the end of the year or just the beginning of the year? Do you have any recollection on that score?

A. No, sir, I don't.

Q. You are sure that it occurred in 1954 and it occurred more than once?

A. I believe so.

Q. In fact, quite a number of times?

A. That I don't recall whether quite a number of times.

Q. When the judge asked you about Exhibit No. 2, the return for the last quarter of '53——

A. Yes, sir.

Q. ——and he and you expressed the opinion that there were sufficient funds to cover the check at that time——

A. Yes, sir.

Q. ——that is entirely guesswork on your part, is it not?

A. Well, the way I figured, the way I figure this, Mr. Hoddick, is that if he would have taken the deposit for that day or for a few days and deposited it in the bank and held it, he could have paid it. [265]

(Testimony of Katsuyoshi Watanabe.)

Q. And when was it that you first showed them?

A. Sometime in April.

Q. Of 1954? A. '54, sir.

Q. And that was the first time they came into the office? A. She was the first one.

Q. And those retaining copies were accurate to the best of your ability to make them so?

A. Yes, sir.

Q. So that the tax liability of Home Furniture Company on these withholding taxes was known and was available to the Internal Revenue Service Agent? A. Yes, sir.

Q. I believe you testified that the books were shown with the approval of Mr. Abdul?

A. Yes, sir.

Q. He did give his approval? [268]

A. He did.

Q. You also testified on redirect examination that some time in 1954 the contracts were discounted with the Central Pacific Bank?

A. Sometimes, yes, sir.

Q. And that for the contracts there was always some discount source available while you were working for the company?

A. Well, it depends on the bank. If they accept it, fine; if they don't, then I couldn't tell you whether or not.

Q. Isn't it your recollection that the Central Pacific Bank stopped accepting these contracts for discount some time in 1954?

(Testimony of Katsuyoshi Watanabe.)

A. I am not sure exactly what time they stopped accepting.

Mr. Hoddick: I think that's all, your Honor.

Mr. Crumpacker: Based upon the Court's questions, I would like to ask some.

The Court: Very well.

Re-Redirect Examination

By Mr. Crumpacker:

Q. You stated at the time you showed the books to Miss Burns you had the approval of Mr. Abdul. Was any approval given by Mr. Abdul any other time to show the books to Miss Burns or any other Internal Revenue agent? [269]

A. I don't believe I was in contact with the agent at the time. What I mean to say is that the only time I showed the agent, Miss Burns, was the only one. And later Mr. Fiellin did come in. And he wanted to get certain information and wanted to look at certain items. I told him that he should see Mr. Abdul.

Q. You referred him to Mr. Abdul?

A. Yes, sir.

Q. With regard to whether there were sufficient funds on hand at any one time, at the specific times for which these returns were prepared and the checks were drawn, was it not your understanding—you previously stated, did you not, that there was an account set up to represent the taxes withheld?

A. Depository receipt.

Q. Well, and even after that was there not an

(Testimony of Katsuyoshi Watanabe.)

account in your books showing taxes withheld, accrued taxes? A. Accrued taxes, yes.

Q. Was it your understanding that those monies were held in trust for the United States?

Mr. Hoddick: Just a minute. We will object to it as a leading question.

The Court: Objection sustained.

Q. (By Mr. Crumpacker): What was your understanding with respect to those funds?

A. It should have been—— [270]

Mr. Hoddick: Just a second. I will object to that as being entirely immaterial and irrelevant and also assuming a fact not in evidence, that there was such fund that existed.

The Court: The witness has already testified that there was an account set up of taxes withheld, accrued taxes.

Mr. Hoddick: Yes, your Honor. This is a question, however, that implies the term “fund” as distinguished from this ledger account of accrued taxes.

The Court: Yes, you are correct there. The objection is sustained.

Q. (By Mr. Crumpacker): What was your understanding with respect to that account as to what that represented?

A. That represented that the Home Furniture owed the government taxes.

Q. In connection with the 1953 returns, you stated you believed there was sufficient monies at the time that was prepared and the check was drawn?

(Testimony of Katsuyoshi Watanabe.)

A. Yes, sir.

Q. But not as to the 1954 return?

A. Yes, sir.

Q. Was the reason that there was not sufficient funds because other obligations had been paid, other checks had been sent out by Mr. Abdul to pay creditors?

Mr. Hoddick: I object to the question as leading and suggestive. [271]

The Court: Sustained.

Mr. Crumpacker: Your Honor, this is based on the Court's question.

The Court: The objection is sustained. I have another question in mind that I am reluctant to examine witnesses on in a trial of this nature. But I would like to ask this question and if counsel want to ask other questions on the basis of it, they may.

Mr. Wantanabe, will you describe briefly to the jury the nature of the other obligations of the Home Furniture Company, Limited, during the period of 1954 and 1955? Do you know what I mean by that?

The Witness: Yes, sir.

The Court: Describe it, please.

The Witness: Our obligations?

The Court: Besides wages. You have already gone into that.

The Witness: The obligations were to pay his employees, his creditors, the finance company that he had collected the funds for, and the debenture bonds, dividends that was due to the debenture holders. That's about all.

(Testimony of Katsuyoshi Watanabe.)

The Court: The creditors is a very broad term. You said some time ago that the business was household furnishings and furniture?

The Witness: Yes, sir. [272]

The Court: What was the nature of the obligations, if any, with respect to the purchase of goods which were put on sale?

The Witness: It was on a—I believe it was on a 30-day account to be paid within 30 days of the purchase from wholesalers. And at times we had drafts, I believe, sight drafts from the manufacturers from the mainland.

The Court: Does that pretty well cover it?

The Witness: Yes, sir.

Q. (By Mr. Crumpacker): What time of the month did you previously state that you prepared the tax returns, approximately?

A. About, usually about the 23rd.

Q. Was it ever before that?

A. Sometimes earlier, maybe about the second week.

Q. Let me ask you this: In each instance during 1954, the first three quarters returns were prepared, as well as the last quarter of 1953, from the time you prepared the return until the day it was due, namely, the end of the month, were there in each instance sufficient receipts by the corporation with which to pay those taxes?

A. I couldn't give you a definite answer on that, Mr. Crumpacker.

Q. But you have stated in response to the

(Testimony of Katsuyoshi Watanabe.)

Court's questions that during this whole time there were other obligations [273] being paid out continually to creditors of the corporation?

A. Yes, sir, there were, of the creditors.

Q. The creditors of Mr. Abdul's selection?

A. I believe so.

Q. In other words, whichever ones he decided to pay? A. Yes, sir.

Q. And out of all those monies paid to other creditors would there have been sufficient money to pay these taxes? A. I would say, I believe so.

Q. You were asked if it was your practice to write checks for Mr. Abdul's signature when you knew there were not sufficient funds to cover them. I believe you said you did. I would like to have you clarify that. Did you not answer that it was because you knew that certain checks were held back?

A. Well, because actually, as I said, he paid certain bills or certain obligations as his wish, and that knowing that receipts for the day have already been deposited——

Q. In order to assist him in determining whether or not to send out or how many checks to send out, you earlier stated, did you not, that you prepared a how-goes-it sheet to the best of your ability showing what funds were available?

A. Daily summary.

Q. Daily summary?

A. Of course, the daily summary consists of all the checks written. [274]

Q. But it also showed other information?

(Testimony of Katsuyoshi Watanabe.)

A. Yes, sir.

Q. So that he would know how much funds were available at the time? A. Yes, sir.

Q. At least to the best of your ability to determine that? A. Yes, sir.

Q. Now, you stated, I believe, that you did not actually hold an amount in dollars aside which represented these withholdings from the wages, is that right? A. Yes, sir.

Q. However, during this whole period of 1954 and the first part of 1955, did your books not show that such monies were held aside? Did you not have an account, as you earlier testified, showing that these monies were withheld?

A. The monies were never withheld. It was withheld from the employees. That is accrued taxes.

Q. The employees were not paid the money?

A. They were not paid the gross amount. They were paid net, due after taxes.

Q. And your books reflected, did they not——

A. Yes, sir.

Q. ——during this whole period that these payments have been withheld—— [275]

A. Yes, sir.

Q. I am confused. I don't know whether anyone else is. Will you state once more what you meant when you said that you were overdrawn? Do you mean that you were overdrawn in your books or that you were in fact overdrawn with the bank?

A. We were overdrawn in the books and sometimes we were overdrawn in the bank. too. The

(Testimony of Katsuyoshi Watanabe.)

bank would call us and tell us that the account is overdrawn.

Q. And in that latter instance, how often was that during 1954? A. I can't recall, sir.

The Court: What?

The Witness: I can't recall.

Mr. Crumpacker: I have no further questions.

Re-Recross-Examination

By Mr. Hoddick:

Q. Mr. Watanabe, you testified that the employees were not paid the gross amount of their wages? A. Yes, sir.

Q. It is a fact, is it not, that there were several occasions during 1954 when the pay checks issued to the employees or to some of the employees bounced?

A. I believe at times the bank would not accept our checks.

Q. In other words, there were insufficient funds in [276] fact in the bank to even cover wages at times? A. I believe so.

Q. Aside from the various obligations which you mentioned to the judge of Home Furniture Company, Limited? A. Yes, sir.

Q. There were also items such as utilities to pay?

A. Yes, sir.

Q. And advertising that had to be purchased?

A. Yes, sir.

Q. And occasionally obligations on contracts that

(Testimony of Katsuyoshi Watanabe.)

went bad that you had to sign them over with recourse?

A. Whether it was recourse, it was signed back.

Q. But it became an obligation of the Home Furniture Company?

A. It was an obligation of the Home Furniture.

Q. Unless you made good that obligation, Mr. Abdul could not continue to get the discount credit?

A. That was the agreement. I am not sure.

Q. That was something that had to be paid in order to keep the business going?

A. Actually what happened, they took it out from the new contract when it was sent over——

Q. So that listed the gross amount of the receipts that came back?

A. The net, gross and net amount. Not the gross. The [277] net amount.

Q. I am not too familiar with the terms of the merchant's field. What is a sight draft?

A. It is a draft that is payable after he sees the merchandise. That would be, he pays that after he accepts that, sees the merchandise; if he wants it, he will accept it.

Q. Well, when the merchandise arrives here from the west coast, it is held on the dock until a sight draft is paid? A. Yes, sir.

Q. And is it not also a fact that Home Furniture Company, Limited, would have to pay storage on this merchandise that was held on the dock?

A. Storage and demurrages. If and when the expiration time expires——

(Testimony of Katsuyoshi Watanabe.)

Q. So the sight draft was paid and the sooner the sight draft was paid, the lower the overhead on the receipt on this particular merchandise?

A. Yes, sir.

Q. And, of course, he had to have merchandise in order to be in the furniture business?

A. In business.

Mr. Hoddick: That's all.

Mr. Crumpacker: One question based on that, your Honor.

The Court: This will be the last question of this [278] witness?

Mr. Crumpacker: Yes.

Q. (By Mr. Crumpacker): You say or you said numerous disbursements were made to pay the sight draft to get the furniture. What you are saying, then, is that during this period when these taxes were delinquent, Mr. Abdul was buying new furniture, making purchases for the corporation of new furniture with money which could have been used to pay these taxes, is that correct?

Mr. Hoddick: I object to the question as leading and suggestive and summarizing the witness' testimony.

The Court: The objection is sustained. You are excused, Mr. Watanabe. [279]

* * *

JAMES WALKER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Crumpacker:

Q. Will you state your name for the record, please? A. Jimmy Walker.

Q. And your occupation?

A. Radio announcer.

Q. Do you know the defendant in this case?

A. I do.

Q. Is he in this courtroom?

A. Yes, he is. [295]

Q. Will you identify him?

A. Mr. Abdul. (Indicating.)

Mr. Hoddick: We will stipulate that the witness has identified the defendant.

The Court: Very well.

Q. (By Mr. Crumpacker): How do you know him?

A. From business dealings when he was in the furniture business.

Q. And how long have you known him?

A. Approximately eight or nine years.

Q. Directing your attention to on or about the first day of February, 1955, did you have occasion to have a conversation with Mr. Abdul wherein the subject of federal taxes was involved?

A. Yes, I did.

(Testimony of James Walker.)

Q. Will you state where that was and what the conversation was?

The Court: And who was present.

Q. (By Mr. Crumpacker): And who was present?

Mr. Hoddick: Might I object to the question as involving several parts and have the time, place and persons present established first?

The Court: That is the better procedure, I think, Mr. Crumpacker.

Q. (By Mr. Crumpacker): Where was this conversation? [296]

A. At the offices of Home Furniture Company on South Beretania Street.

Q. And what time of day or do you recall the date or the day of the week?

A. On or about February 1st, I assume it must have been in the afternoon because evidently I would have had to come off the radio broadcast and I usually come off at one o'clock.

Q. And who was present besides the defendant and yourself, if you recall?

A. An oriental gentleman whom I assume to be one of the employees of Home Furniture. In what capacity, I don't know.

Q. Anyone else?

A. Mr. Abdul himself.

Q. And what was the nature of your visit there?

A. To try to offset an action that Mr. Abdul was contemplating where I was a co-maker on a purchase contract from Home Furniture.

(Testimony of James Walker.)

Q. And how did the question of federal taxes come up?

A. Well, I explained to Mr. Abdul at the time that I was unable to do very much on the matter because I was indebted to Uncle Sammy for some excise taxes of some ten years ago which I was paying off every month and is still being paid off. And that my first obligation was to the federal government. Specifically I said Uncle Sam, and after I get through with them then I can take care of other matters. And at that time I was [297] unable to do anything about it. So the retort that I got from Mr. Abdul at the time was——

The Court: Instead of having a retort, Mr. Walker, will you try to give the words spoken as best you can remember?

The Witness: All right, your Honor. When I mentioned this to Mr. Abdul his words, as far as I can remember, "I don't give a damn for Uncle Sammy. I come first and I will get my money before Uncle Sammy and I have ways of doing it." And the conversation carried on further as to the fact that he had to have his money and he didn't care how he was going to get it and would leave no stone unturned until that bill was collected, although I was not the purchaser but only the co-maker.

Q. (By Mr. Crumpacker): Was that the sum and substance of the conversation?

A. It was.

Mr. Crumpacker: I have no further questions.

(Testimony of James Walker.)

Mr. Hoddick: May it please the Court, I move to strike the entire testimony of the witness as being entirely immaterial and irrelevant to the issues raised in this indictment. It is irrelevant and that simply is it. It has nothing to do with what Mr. Abdul's state of mind was about his own taxes which he may or may not have owed at that time or doesn't relate to any particular taxes which he is charged with having owed and not paid in the indictment. I was going to say that this conversation that Mr. Walker has testified about apparently [298] concerned solely a debt that he owed the Home Furnishings Company and taxes which he owed Uncle Sam.

The Court: The motion is denied.

Mr. Hoddick: May I have a moment, your Honor? (Defense counsel confer.)

Mr. Hoddick: Your Honor, the defendant has a further motion to make at this time which we ask leave to make in the absence of the jury.

The Court: You may make the motion in the presence of the jury. If it is necessary to argue it, the argument will take place in the absence of the jury.

Mr. Hoddick: Your Honor, we move for a mistrial in this proceeding on the basis of the testimony just given.

The Court: Ladies and gentlemen of the jury, you will be excused until called by the Court.

(Jury leaves courtroom at 9:10 a.m.) [299]

(Testimony of James Walker.)

The Court: Let the record show the jury is present, the defendant and his counsel. The motion is denied.

Cross-Examination

By Mr. Hoddick: [311]

* * *

GEORGE D. STRATTON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Crumpacker:

Q. Will you state your name, please?

A. My name is George D. Stratton.

Q. Your occupation?

A. I am a collection officer assigned to duties in the Honolulu office.

Q. What office?

A. The Honolulu office.

Q. Of what?

A. Of the Internal Revenue Service.

Q. What were your duties, what was your occupation in 1955?

A. It was the same, collecting, Internal Revenue.

Q. Directing your attention to the month of April, 1955, did you have occasion in your duties to have an assignment in connection with the taxes for the Home Furniture Company?

A. I did.

(Testimony of George D. Stratton.)

Q. And will you explain, will you state when that was?

A. On April 22nd, in 1955, I was assigned four accounts to collect. Our terminology there calls them the DA's. Those are taxpayer's delinquent accounts upon the Home Furniture Company, Limited. [320]

* * *

Q. Now, back to your call after the first of the year, when was that? A. January 4th.

Q. What took place? A. 1956.

Q. What took place then?

A. I called on Mr. Abdul and informed him that it was necessary that I collect these accounts, that if he did not voluntarily pay them I would be forced to take legal action to collect the accounts. I explained to Mr. Abdul what I meant by legal action, and by legal action I meant proceed to levy by distraint. Mr. Abdul said, I don't want you to do that but I would like to make another part-payment offer. I told Mr. Abdul I did not have authority to make a part-payment offer but that due to his poor paying record in the past that if he desired to make a part payment record he must see my superior officer who at that time was Mr. Herbert Chock, the [332] group chief. We left it at that and I returned to the office and conversed with Mr. Chock on the case, all phases of the case up to that point. Mr. Chock was in agreement with me as to not accepting a part-time offer at that time. So we went over the necessary steps in taking legal action to collect the accounts.

(Testimony of George D. Stratton.)

Q. And what action did you take?

A. We did not take any action by virtue of the fact that in one of the local newspapers there was noticed a big notice that the Home Furniture Company was holding an auction of their stock in trade. I immediately went to the Home Furniture Company to investigate and learn more of this auction. I found the sheriff there, or one of the undersheriffs, and learned of the procedure to be held in the auction. I immediately notified the sheriff that our liens were prior to any claims of any other creditors and that if the auction was held I would distraint upon the sheriff and levy upon him for all funds collected.

The result of that was, it amounted to an agreement being reached between the creditors and our office of allowing us to take a per cent of the net proceeds of the sale. The net proceeds from the sale, I should say. And to apply it to Mr. Abdul's outstanding obligations. This per cent was 80 per cent. This seemed a satisfactory arrangement at that time for us to collect the revenue, which we did, to collect in full, if [333] I remember right, and the date was February 1st or 2nd that the sale started up, until February 12th or 13th. The funds were collected in full through that arrangement.

Q. That is, all the taxes due as of that date?

A. All the taxes due as of that date. [334]

(Testimony of George D. Stratton.)

Cross-Examination

By Mr. Hoddick:

Q. Mr. Stratton, at the time that this agreement was arrived at, with reference to taking 80 per cent of the proceeds of the auction of the Home Furniture Company, Limited, stock in trade, was that arrangement agreed to by Mr. Abdul?

A. It was.

Q. Did he ever at any time refuse to pay these taxes to you?

A. How do you mean "refuse"? He did not pay when asked to pay.

Q. Did he ever tell you that he was not going to pay? A. No, he did not.

Q. He consistently told you that he lacked the funds, is that true, and had hoped to pay it some time in the near future?

A. Yes; that is true. [335]

* * *

Q. So any payments that were received by virtue of this allocation of percentage of the proceeds of the auction came after January 30th?

A. Yes, that's right.

Q. And any payments that were received prior to January 30th would have been payments made by the taxpayer on the delinquent accounts?

A. Yes, that is true.

Mr. Hoddick: May I have a series of receipts, your Honor, marked for identification?

(Testimony of George D. Stratton.)

The Court: Are they all together?

Mr. Hoddick: Yes, your Honor, they are all in chronological order.

The Court: How many are there?

The Clerk: Fifteen, your Honor.

The Court: They will be marked as Exhibit 1, Exhibits [341] B-1 through B-15, for identification.

(The documents referred to were marked as Defendant's Exhibits B-1 through B-15 for identification.)

Q. (By Mr. Hoddick): Mr. Stratton, I hand you Defendant's Exhibits B-1 through -15 for identification and ask you to identify those, please? (Handing documents to the witness.)

A. These are form numbers 809. It is a collection officer's official receipt which he gives for taxes paid. And these receipts are all signed by myself as the collection officer in receiving these funds.

Q. And I presume that the date that appears on them is the date that the funds were received?

A. Yes, sir; that is true.

Q. Will you go through the receipts that you have there before you and tell us what payments were made on what days through January 30, 1956, as shown by the receipts?

A. Through January 30th?

Q. Yes.

A. You want me to enumerate the amounts, is that what you wish for me to do?

Q. Yes, the date.

(Testimony of George D. Stratton.)

A. On January 30th, the sum of \$547.16 was received from Home Furniture. Likewise on January 30 an amount of \$217.10 was received from the Home Furniture. And on January [342] 31st——

Q. No, through January 30th. Go back before then. A. Oh, before that?

Q. That's right.

A. On January 27th, a receipt for \$1,303.15 was received. Of that a certain amount was cash and the majority in checks. And on January 28th an amount of \$433.35 was received. And then there are two here that's prior to January 30th.

Q. And two on January 30th?

A. That's right, sir.

Q. Now, between the payments that were made prior to the auction and the payments that were made from the proceeds derived from the auction, the defendant in this case paid in full the taxes, penalty and interest assessed up to that time, is that correct?

A. Pardon me, I was thinking of something else there. Will you restate that question? I'm very sorry.

Q. I say, through the payments made prior to the auction by the defendant and the payments made from the proceeds of the auction, the defendant paid all taxes due, interest and penalties assessed up to that time, did he not?

A. That is true, yes.

Q. And that covered all taxes due, all penalties

(Testimony of George D. Stratton.)

and interest assessed for the last quarter of 1953, the first three quarters of 1954, and a penalty on the last quarter of '54, and [343] the first two quarters of 1955? A. Right.

Q. Is that correct?

A. Yes, sir; that's correct.

Q. And, as a matter of fact, Mr. Stratton, when the money had been all counted up in the till of the Internal Revenue Service, it was found that he had overpaid by about \$117 which was returned, is that correct?

A. I believe you are right on that, sir.

* * *

Redirect Examination

By Mr. Crumpacker: [344]

* * *

Q. (By Mr. Crumpacker): We will strike that question and let me ask you, these Defendant's B-1, -2, -3, -4, -5 for identification showing payments received January 27, 28, 30, 31st, in what form were those payments received?

A. These payments were received in the form of cash and checks. [345]

Q. From whom? A. From Mr. Abdul.

Q. Did they have any connection with the auction? A. They did.

Q. Can you explain why they were received before the auction or how they were received before the auction?

(Testimony of George D. Stratton.)

A. May I state that maybe I have the wrong starting date of the auction. I had a clipping put away in my file, personal file in the office, but I could not find that. But I do know that the funds here are from the result of the auction sale, that I know.

Q. Well, does your reference to those receipts refresh your memory as to the date of the beginning of the auction?

A. They do very much, sir.

Q. Well, by reference to them can you recall definitely what date it was?

A. It was either the first or second day of the auction.

Q. No; I say, what is the date of the auction? My question to you is, by reference to these receipts can you refresh your memory as to when the auction began?

A. In reference to these receipts evidently on the 26th or 27th of January instead of the 30th of January. May I elaborate a little on this?

Q. Yes; I would like to have you explain it if you can.

A. I called daily on Mr. Abdul to check the funds, the 80 per cent. He had it all counted out by checks and cash. [346] The other 20 per cent went to his other creditors, I assume. I do not know. But it went to some funds. But we were entitled 80 per cent by the agreement. Mr. Abdul had the funds either at the close of the day of the sale or the following morning, which such funds I

(Testimony of George D. Stratton.)

picked up every day. And, as I stated awhile ago, this refreshes my memory that evidently the sale did start on the 26th or 27th, and I made erroneous testimony in saying it started the 30th. [347]

* * *

Mr. Hoddick: That's correct.

The Court: Well, that objection will be overruled and they will be received in evidence as Exhibits 15, 16, 17, 18 and 19.

(The documents referred to were received in evidence as Plaintiff's Exhibits 15, 16, 17, 18 and 19.)

Mr. Crumpacker: The individual returns?

The Court: Yes, and 18 and 19. You did not offer 20.

Mr. Crumpacker: No.

Mr. Hoddick: Your Honor, may the record reflect that I believe your Honor asked me whether our only objection is one of lacking materiality, and I replied, yes. We also add to that objection the objection of irrelevancy.

The Court: Yes, the objection will be overruled. The Court will recess until 1:45.

(The Court recessed at 12:03 p.m.) [358]

RAYMOND A. FIELLIN

a witness on behalf of the plaintiff, having previously been sworn, resumed and testified further as follows: [413]

* * *

Cross-Examination

By Mr. Hoddick: [427]

* * *

Q. But from your examination of the records, and so on—well, eliminate the “so on”—from your examination of the records and from your conference with Mr. Abdul and Mr. Watanabe and any other person who might have been connected with the corporation, you saw nothing which would have led you to believe [436] that these returns were inaccurate, would you?

Mr. Crumpacker: I object to that as asked and answered. I will stipulate if counsel desire that the returns were accurate, your Honor.

Mr. Hoddick: That will be satisfactory.

The Court: Very well.

Mr. Hoddick: I assume that covers all of the returns, Mr. Crumpacker?

Mr. Crumpacker: Yes.

Q. (By Mr. Hoddick): By the time you had closed your investigation, Mr. Fiellin, you had ascertained, had you not, that the Plaintiff's Exhibit No. 2, which is the return for the last quarter of 1953, had been filed and had been paid in full, interest, penalty and principal?

A. I don't believe that that was paid at the time.

(Testimony of Raymond A. Fiellin.)

It was received without remittance. And during October, November, Mr. Hughes made a payment of a thousand dollars on it. But I don't think it had been paid in full. That would be shown on that form 899.

Q. You know now it has been paid in full?

A. I believe it has. But I would want to look at the 899 before I said so.

Q. Is that that certificate? A. Yes.

(Mr. Hoddick hands a document to the witness.) [437]

A. This shows a payment on October 21st of 1955 of a thousand dollars and a liability of \$2,987.58. At the time I concluded my investigation that was the status of that return.

Q. And when does it show final payment?

A. February 3rd, 1956.

Q. And no balance due on the principal, penalty or interest?

A. It doesn't show that any balance was due.

Mr. Crumpacker: Excuse me. I don't understand that question. Is that in regard to 19——

Mr. Hoddick: Last quarter of 1953.

Q. (By Mr. Hoddick): With reference to Plaintiff's Exhibit No. 4, which is the quarterly return for the first quarter of 1954, what payments had been made thereon as of November, 1955?

Mr. Crumpacker: Your Honor, I will object to this questioning. I believe that 899 has already been explained and it speaks for itself. I don't think we should go into this.

(Testimony of Raymond A. Fiellin.)

Mr. Hoddick: Your Honor, he was investigating the lateness of filing and the lateness of payment.

The Court: The objection is overruled.

A. The March, 1954, quarter was paid on February 28, 1955.

Q. (By Mr. Hoddick): In full?

A. Yes. [438]

Q. And how about the penalty and interest on that quarter?

A. They were paid on May 19, 1955.

Q. By the way, what is the rate of interest on these matters for delinquent returns?

A. I don't know.

Q. As to the second quarter of 1954, when was that paid? A. January 30, 1956.

Q. And when were the penalties and interest on that quarter paid?

A. May 25th—well, there is an accumulation here. The return itself was paid with an NSF check. That check was returned and it goes back as another charge. Then a portion of the check was paid on January 27, 1956. And interest and a lien fee on that amount was paid on January 28, 1956. And in full then on January 30, 1956. Then the delinquency penalty and the interest on the penalty were paid as of May 25, 1955, in full, as of January 30, 1956.

Q. It had been paid in full? A. Yes.

Q. Penalty and interest and principal?

A. Let's see if it crops up again over here. (Referring to document.) Yes.

Q. As to the third quarter of 1954, when was that paid in full, penalty, interest and principal?

(Testimony of Raymond A. Fiellin.)

A. The amount of the return was paid on February 28, 1955. [439] Penalty and interest paid on May 1st, 1955.

Q. And as to the first quarter of 1955—withdraw that—when were the penalties and interest paid on the last quarter of 1954?

A. They were paid on May 19, 1955.

Q. And that was also a return which was filed in February, 1955? A. Yes.

Q. As to the first quarter of 1955, when had full payment of principal, penalty and interest been made?

A. First quarter of 1955 was paid in full as of February 10, 1956.

Q. And the second quarter of 1955?

A. Was paid as of February 6, 1956.

Q. So that as of February, the end of February 1956, as to all of the forms 941 which are the subjects of this indictment, penalty, interest and principal had been paid?

A. 2-10-56 is the last date. [440]

* * *

DANIEL LAWRENCE ABDUL

a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Hoddick: [492]

* * *

(Testimony of Daniel Lawrence Abdul.)

The Court: Well, the book will be marked as Exhibit H for identification.

(Mr. Hoddick shows book referred to to Mr. Crumpacker.)

Q. (By Mr. Hoddick): Mr. Abdul, I hand you Defendant's Exhibit H for identification and ask you if you can identify that book? (Handing book to the witness.)

A. Yes, this is the book where the records of the transactions at the store were kept in.

Q. Who kept the records in that book?

A. Several bookkeepers that we have had in the past, and the last one being Watanabe. Also the check by Leman and Hough.

Q. And that is a record of various accounts and transactions of the Home Furniture Company, Limited, is that correct? A. Yes.

Q. Are you able to find in that book any of these reconciliations that you have referred to that Mr. Watanabe would make at the end of the month?

A. Yes, I have the sheets before me now.

Q. And is there such a reconciliation for the end of each month? A. Yes, there is.

Q. What are those sheets numbered for purposes of identifying their position in Defendant's Exhibit H for identification? [506]

A. Just these particular sheets?

Q. Just the sheets covering the reconciliation.

A. They don't seem to have a number. Oh, yes, some of them.

(Testimony of Daniel Lawrence Abdul.)

Q. Well, in what portion of the book are they located?

A. They are located in the portion under the heading "journal."

Q. And they are the last sheets in that portion of the book?

A. Being the third to the last category in the book.

Q. Now, is there such a reconciliation statement there as of December 31, 1953?

A. Yes, there is.

Q. You have it in front of you?

A. Yes, I have.

Q. What does it show as the balance in the bank?

A. I'm sorry, I've got the wrong place.

Q. First of all, can you identify the handwriting in which that reference reconciliation was prepared?

A. Yes, this is made by Watanabe.

Q. And what does it show as the balance in the bank on that date?

A. It shows the balance in the bank as of that date was \$1828.68.

Q. And what does it show in terms of deposits in transit? [507]

A. \$300.90.

Q. Making a total of how much?

A. \$2,100.90.

Q. And what does it show the terms of outstanding checks? A. \$3,625.16.

Q. Is there a similar reconciliation sheet as of

(Testimony of Daniel Lawrence Abdul.)

March 31, 1954? A. There is.

Q. What does that show as the balance in the bank on that date? I will withdraw that question. In whose handwriting is that reconciliation?

A. Watanabe.

Q. What does it show as the balance in the bank? A. \$424.05.

Q. \$424.05? A. That's right.

Q. And how much in the form of deposits in transit? A. \$716.48.

Q. And that totals what? A. \$1,140.53.

Q. And what does it show in checks outstanding?

A. \$13,811.88.

Q. You have a similar reconciliation statement there as of June 30, 1954? [508]

A. Yes; I have.

Q. In whose handwriting is that statement?

A. Watanabe.

Q. And what does it show in terms of balance in the bank? A. \$261.54.

Q. How much in deposits in transit?

A. None.

Q. None? A. None.

Q. What does it show in terms of checks outstanding? A. \$8,647.95.

Q. Now, will you see if there is a reconciliation statement as of September 30, 1954?

A. Yes; I have.

Q. And in whose handwriting is it?

A. Watanabe.

(Testimony of Daniel Lawrence Abdul.)

Q. What does that show in terms of balance in the bank? A. \$57.12.

Q. How much? A. \$57.12.

Q. And how much in deposits in transit?

A. None.

Q. None? A. None. [509]

Q. How much in checks outstanding?

A. \$6,847.14.

Q. Was there a similar statement there for December 31, 1954? A. Yes.

Q. In whose handwriting is that statement?

A. Watanabe.

Q. And what does it show as the balance in the bank? A. \$2,825.34.

Q. And how much in the form of deposits in transit? A. \$251.15.

Q. How much in terms of checks outstanding?

A. \$15,665.30.

Q. What is the last month for which a reconciliation statement has been prepared or is contained in that book? A. January of 1955.

Q. And it was in February of 1955, that Mr. Watanabe stopped working on a full-time basis?

A. That's right. He continued to work from that time on a part-time basis, to do the very same work.

Q. Now, you have heard Mr. Watanabe's testimony to the effect that you maintained a manila folder in your desk? A. Yes.

Q. In which you held back checks?

A. Yes; I did. [510]

Q. And how would you determine what checks

(Testimony of Daniel Lawrence Abdul.)

to hold back and what checks to send through for payment?

A. We only paid the things that we just absolutely had to pay in order to keep the doors open.

Q. When did you first set up this holdback folder?

A. I believe it was in the latter part of 1953 when we started having our trouble with the finance company.

Q. The reconciliation statement for March of 1954 shows checks outstanding in the amount of \$13,811.88. Would all the checks which totaled that amount be contained in your holdback folder as of that date or had some of them been sent out for payment?

A. There were a good many of them that were out in transit somewhere between our office and the creditor that we had mailed it out to. Some of them were still in the folder.

Q. Are you able to tell today what proportion of that \$13,811.88 had been put through for payment and what proportion was in your folder?

A. I would not be able to tell today.

Q. Would your answer be the same for the other totals of outstanding checks of these other reconciliation sheets that you refer to?

A. Yes; my answer would be the same.

Q. Some would have been put through for payment and some were still held? [511]

A. That's right.

Q. And your reason for holding them?

(Testimony of Daniel Lawrence Abdul.)

A. We just didn't want to have checks outstanding, checks delivered to people that we owed obligations to that would not clear through the bank.

The Court: I can't hear. Would you please read that answer?

(The reporter read the last answer.)

The Court: Keep your voice up, Mr. Abdul.

Q. (By Mr. Hoddick): Did there ever occur any instances when checks which you put through for payment did bounce?

A. Yes; it happened quite frequently. As carefully as we tried to be in checking the balances at the bank and running our recaps each day to try to avoid having it happen. And it did happen. [512]

* * *

Q. And on other occasions when you were in conference with either Mr. Fiellin or Mr. Stratton, the testimony that you made statements that you thought they had been mailed and if they hadn't received them you didn't know where they were?

A. Yes.

Q. Now, at the time that you made such statements to the representatives of the Internal Revenue Service concerning these particular returns, these particular tax returns about which they testified, did you in fact believe that you had mailed those returns?

A. I knew that the returns had not been mailed, that I was trying to gain time in which to raise the

(Testimony of Daniel Lawrence Abdul.)

cash to pay the taxes. At no time did I ever try not to pay it. I just didn't have the funds to [520] pay it.

Q. And what were your reasons for continuously putting them off on appointments and asking to come back later?

A. Hoping to be able to find some source, raise the funds that we needed, borrow the funds that were needed, have a sale, move a group of merchandise to get cash to be able to pay the taxes.

Q. Did you ever tell Mr. Watanabe not to show any particular corporate record or document to the representatives of the Internal Revenue Service?

A. Never.

Q. You heard testimony by Mr. Fiellin and perhaps by Mr. Stratton that when he asked you for particular documents from time to time and particular records you would go to the safe and would return and say that you couldn't find them. Did you, in fact, know where the records were?

A. Well, Mr. Watanabe was working for us on a part-time basis at that time, and working for us on a part-time basis he had many of the books and records over at his house to be able to do the posting. So many of the things were not there at the store. And I would have to arrange for him to bring it in so that we could be able to show the information to Mr. Fiellin or Mrs. Burns or Mr. Stratton or whoever came in to look for them. [521]

(Testimony of Daniel Lawrence Abdul.)

Cross-Examination

(Continued)

By Mr. Crumpacker: [554]

* * *

Q. Now, let me ask you, isn't it true that in your dealings, not only with the Bishop Bank but also with these other people that you dealt with, one of the methods that you were using to make sales was to take, for example, a four [559] hundred dollar bedroom set, and tell the customer—say a customer comes in and he says he can't make a down payment, and you say that is all right, we will just mark it up four hundred, fifty dollars and give you credit for fifty dollars down payment and then you discount the paper with the bank at the amount of four hundred dollars, which is exactly the price that your furniture was marked at in the first place. Isn't that the type of practice you were doing?

Mr. Hoddick: Your Honor, we will object to the question as being immaterial and irrelevant to any issue in this case. And it is outside the scope of the direct examination.

The Court: The objection is overruled.

A. That was not my practice.

Q. (By Mr. Crumpacker): You deny that?

A. I deny that.

Q. Let me ask you about some of your other practices. Isn't it true that you made a practice of taking a contract from somebody when you sold

(Testimony of Daniel Lawrence Abdul.)

them some furniture or something else from your store, and if it turned out later that they were unable to make the payments regularly, you would have them sign a promissory note on top of the contract for additional amount of money? Wasn't that a practice of yours also?

A. If the account had become a collection account and there were attorney's fees and collection fees, involved in [560] the collection——

Q. Were you collecting attorney's fees yourself?

A. At one time we had a collection agency handling our collections, and later we had them collected from an attorney's office and when the account became a collection account we would add onto the account the attorney's fees and collection fees and any cost of court that may be involved in the collection of the account.

Q. Well, you collected the money yourself and you added attorney's fees on it?

A. Well, we either collected it through our office or through the attorney's office and the attorney was getting the percentage of collections to take care of his work in handling the collections.

Q. Explain this promissory note proposition? How did that work?

A. If the account became delinquent and it became a collection account, it was turned over either to a collection agency at first and later directly to an attorney. We would add onto the account the attorney's fees, collection fees, any costs of court in-

(Testimony of Daniel Lawrence Abdul.)

volved in the account, and he would sign the promissory note for that amount.

Q. And that was after the contract had already been discounted? It was out of your hands, wasn't it?

A. That was when the account had been referred back to [561] us for collection.

Q. Do you know Mrs. Sawtelle of the Better Business Bureau? A. Yes, I do.

Q. You are pretty familiar with her, aren't you?

A. I know who she is.

Q. You had lots of conversations with her?

A. I had conversations over the telephone with her.

Q. Complaints about the way you were doing business, is that right?

A. There were several complaints which we straightened out to her satisfaction.

Q. You think they were straightened out to her satisfaction? A. I believe so.

Q. Do you remember Mr. and Mrs. Nicholas Aguinoy? Let me refer you to December of 1954. Do you recall selling a tricycle and two toy autos to Mr. and Mrs. Aguinoy for \$66.75?

Mr. Hoddick: Your Honor, we object to the question as being immaterial and irrelevant to any issue in the case. It is improper and I fail to see what the method of doing business with some of his customers has to do with this case.

The Court: If that is a real ground of your objection, then it is overruled, Mr. Hoddick.

(Testimony of Daniel Lawrence Abdul.)

Q. (By Mr. Crumpacker): Do you recall that sale? [562]

A. I do not recall the particular sale, no. The name sounds familiar enough for me to believe that they did have an account with us but I can't remember the items that were purchased or when.

Q. Well, your memory was refreshed by Mrs. Sawtelle, was it not, on several occasions?

A. Well, it may have been at that time——

Q. And you recall talking to her about just what the charges were in connection with this?

A. I don't remember.

Q. With this sale?

A. I don't remember the amount.

Q. You don't remember the amount?

A. No, I do not.

Q. Do you remember that you later got him to sign a note for \$127.00?

A. I do not remember. We may have. I do not remember it.

Q. Isn't it true that at a time when Mr. and Mrs. Aguinoy had paid a total of \$50.00 on this \$66.75 sale and they were delinquent on several payments you told them that there was a balance, that their balance was \$123.26 and you made them sign a note and took \$3.00 from them in cash and made them sign a note for \$120.26?

A. I do not remember. If I had the ledger card in front [563] of me, I might be able to look it up and see.

Q. Do you remember giving numerous explana-

(Testimony of Daniel Lawrence Abdul.)

tions of that to Mrs. Sawtelle, none of which seemed to satisfy her?

A. I talked to Mrs. Sawtelle, I believe, twice on the telephone. And we finally settled the account.

Q. In an amount substantially less than the amount in the promissory note, isn't that correct?

A. I do not remember.

Q. You sold watches, did you not, during this period as well as furniture?

A. At one time we did. And then we discontinued selling any jewelry items.

Q. What do you know was the excise tax item which I believe is shown in the original taxes in your file in connection with the third quarter—the fourth quarter of 1953? I believe there were shown in your books an excise tax item of some \$170.00. What, if you know, did that have to do with it?

Mr. Hoddick: Your Honor, I object to that as being immaterial and irrelevant and outside of the scope of the direct examination. It concerns a withholding tax.

The Court: Is this for the purpose of showing a state of mind, Mr. Crumpacker?

Mr. Crumpacker: Yes, your Honor, for impeachment purposes.

The Court: The objection is overruled. [564]

Q. (By Mr. Crumpacker): Do you know what those excise taxes were for?

A. The excise taxes that we reported and paid were for some jewelry items and, I believe, also

(Testimony of Daniel Lawrence Abdul.)

perhaps some luggage items; any of the items that had an excise tax due on them were reported.

Q. Isn't it true, Mr. Abdul, that during the latter part of 1953, at least, you were making a practice of writing up the sales of watches as furniture in order to avoid paying the excise tax?

A. No, it was not.

Q. It is true, is it not, that you were writing up the sales of watches as furniture?

A. No, it was not.

Q. You deny that? A. Yes, I deny that.

Q. Do you recall a certain former employee of yours quitting because of that practice?

A. No, I do not.

Q. You will acknowledge, will you not, Mr. Abdul, that you had a pretty sad experience with performance on contracts which you sold? When I say "sad experience" I mean people did not make too regular payments, isn't that correct?

A. As I stated before, we sold our contracts to the Equitable Plan Company on a non-recourse basis. We did not [565] bill them. We did not ask them to make payment. We didn't get after them. We only accepted the funds for the Equitable Plan.

Q. And that was a pretty good deal for you, I take it, because you could sell to anybody for no down payment, write it up as a down payment, and then discount the contract to Equitable Plan and wash your hands up, is that right?

A. We did not do that.

(Testimony of Daniel Lawrence Abdul.)

Q. Well, if it was a non-recourse basis, isn't that correct?

A. But we did not do that.

Q. You deny that you ever sold furniture without a down payment?

A. We sold furniture where we allowed a trade-in or we got a down payment.

Q. Well, maybe a down payment of one or two dollars, a token down payment? Did you make many sales that way? A. We got a down payment.

Q. Well, I am asking you, did you make many sales with merely a token down payment, that is, of just one or two or three or four or five dollars for a large sale? A. Not for a large sale, no.

Q. And you deny that you ever marked the price up to take care of the down payment?

A. That was not our practice. [566]

* * *

Q. It is true, Mr. Abdul, that you received numerous complaints about the method of advertising that you used at Home Furniture Company?

Mr. Hoddick: I am going to object to that as immaterial and irrelevant.

The Court: The objection is overruled.

A. We didn't receive numerous complaints. We did receive [578] complaints from time to time from the Better Business Bureau. We would explain what we were doing in the ads and what we thought the ad conveyed. And it would be acceptable to the Better Business Bureau.

(Testimony of Daniel Lawrence Abdul.)

Q. It is true, is it not, that you made use of matter which came from nationally advertised goods, blocking out the nationally advertised names, and using those to advertise goods of an inferior quality?

Mr. Hoddick: We renew our objection as irrelevant and immaterial.

The Court: The objection is overruled.

A. The matters that were used to a great extent were not supplied by us. We would design an ad to sell a mattress. The newspaper would supply the picture of the mattress that was being offered and sometimes they blocked off the names so that the name could not be seen. But it only showed the picture of the item that was being offered for sale.

Q. (By Mr. Crumpacker): In other words, you are saying that this was the practice of the newspaper and not of Home Furniture?

A. We didn't have a complete mat service, no. The newspaper had a mat service.

Q. Well, let me ask you specifically, do you recall a complaint about a chrome furniture set which you advertised, a table and four chairs, and which you used the mat of Virtue [579] Brothers to advertise another chrome furniture set; do you recall that specific instance?

A. I don't recall it specifically, no. We may have done it. I don't remember.

Q. It is true, is it not, that you were making a

(Testimony of Daniel Lawrence Abdul.)

general practice of misrepresenting your goods through your newspaper ads?

A. No, we never misrepresented the goods. We gave a description of the goods and the price the goods were being offered at.

Q. But you did, did you not, use the same format that was prepared by nationally advertised goods which appeared in the paper advertising those, and merely blocked out the name and have the same picture in the newspaper for goods which you were selling for a substantially lesser price, isn't that true?

A. Well, in the case of the chrome dining room set, all the chrome dining room sets that we handled were all nationally advertised. We may not have had a picture from that particular company to show in our ad, and we used another picture to show in our ad.

Q. A picture of a set which sold for a higher price, is that right? A. No, not necessarily.

Q. Well, isn't it true that this Virtue Brothers five [580] piece set sold for \$57.50 and yours were advertised with the same advertisement without the name Virtue Brothers for \$39.50?

A. I don't remember that, no.

Q. That could have happened, though, couldn't it? A. I do not believe so, no.

Q. Would it help if I showed you the ad itself?

A. It would.

Q. I will see if I can find it during the recess.

(Testimony of Daniel Lawrence Abdul.)

Let me ask you this: Do you think that such a practice is a fair and honest practice?

A. As I stated earlier, none of the furniture stores here in town had a complete mat service. The newspapers maintained a mat service. And they would show pictures out of their mat service on items that we advertised. And it was a common practice with all furniture stores.

Q. You didn't answer my question. Do you think such a practice is an honest practice, regardless of who does it?

Mr. Hoddick: We will object to that, your Honor, as being irrelevant. The fact of the practice not having been established in this case, for one thing.

The Court: The objection is sustained.

Q. (By Mr. Crumpacker): Was it true that you received complaints with regard to such advertising not only in connection with chrome furniture but carpet sweepers, steel utility tables, rugs, studio couches, mattresses and box springs, and [581] so on?

A. I do not remember those complaints specifically, no.

Q. But you did receive complaints?

A. We did receive some complaints from the Better Business Bureau. We explained what we were doing in the ad, what we were trying to accomplish, what the ad was trying to say, and we seemed to have explained to their satisfaction.

(Testimony of Daniel Lawrence Abdul.)

Q. As a matter of fact, you say you explained it to their satisfaction, but, as a matter of fact, as a result of those conversations you discontinued the practice, isn't that correct, at least temporarily?

A. I don't remember them influencing me in discontinuing advertising, no.

Q. I mean the practice that I referred to, not advertising, I mean that type of advertising.

A. We did the same type of advertising throughout the entire period that we advertised.

Q. Well, specifically as a result of the complaints you discontinued the use of Virtue Brothers' mat for that chrome furniture set, did you not?

A. We continued to use whatever mat was available in advertising chrome sets.

The Court: Is this a convenient place to interrupt your examination?

Mr. Crumpacker: Yes. [582]

The Court: Ladies and gentlemen of the jury, you will be excused for a ten-minute recess.

(A recess was taken.)

After Recess

The Court: The record will show the jury is present, the defendant and his counsel.

Q. (By Mr. Crumpacker): I would like to ask you just two more brief questions about discounting and assigning for collection of new sales. It is true, is it not, Mr. Abdul, that on at least one occasion you assigned the same account for collection

(Testimony of Daniel Lawrence Abdul.)

to two different collection agencies, both of whom collected on it? A. I do not remember that.

Q. You don't remember?

A. I do not remember ever having such an account.

Q. It could have happened, though?

A. I do not believe so, no.

Q. The other question with regard to your sales, isn't it true that you sold to a good number of people on relief?

A. Not if they indicated that they were on relief. We did make some sales to people based on the application for purchase after getting the credit report, and then it was later discovered, it was later disclosed that they were on relief at the time that the purchase was made, but it was unknown to us at that time. [583]

Q. And you discovered that after you already made the sale?

A. After the sale had been made, after a few payments had been made, after they became delinquent and we started investigating the account.

Q. In other words, you did sell to people on relief without ever ascertaining initially that they were on relief, is that right?

A. We would take their credit application and get a credit bureau report. Based on the application and the credit bureau report, we would grant them credit. And then it was later discovered that we did have one in particular that I do remember, who

(Testimony of Daniel Lawrence Abdul.)

was on relief at that time, although at that time we did not know that she was on relief.

Q. Well, isn't it true that at least ultimately it came out that a substantial number, namely, something close to a hundred sales on time were made to people who were on relief?

A. I do not believe it was as high as that, no.

Q. Not as high as that? A. No. [584]

* * *

Q. (By Mr. Crumpacker): You do acknowledge, nevertheless, that you knew when that return for the last quarter of 1953 was put on your desk in January, 1954, that you knew it was due by the end of January, is that right? [597]

A. That is right.

Q. And knowing that, you didn't file it?

A. Because we didn't have the money.

Q. You understand that you have an obligation besides paying the money to file a tax return? You understand that?

A. Yes. But my understanding was that the money should accompany the tax return.

Q. You heard Mr. Watanabe state on the stand that he told you at least one time that you could file a return without paying the tax?

A. I do not remember him calling it to my attention, no.

Q. But you heard him say that on the stand?

A. I believe I heard him say that, yes.

Q. You acknowledge that the returns for the

(Testimony of Daniel Lawrence Abdul.)

first three-quarters of 1954 were placed on your desk prepared in substantially the same form as exhibits 4, 5 and 7 on a timely basis in the month following the quarter? A. Yes, I remember.

Q. And you knew that each one of those was due at the end of that month in question?

A. Yes, I do.

Q. And with that knowledge you didn't file them?

A. Only because we didn't have the money on hand to pay it with the report. [598]

Q. Would it surprise you to know that during the months of January, February and March of 1954, your bank account, the Home Furniture bank account, shows that over \$70,000.00 went through it or approximately that much, at least over \$70,000.00 were deposited over that period?

A. Because I believe that figure includes the previous \$120,000.00 for the month of January which you gave me before.

Q. I think that if you will refer to your deposits you will find that the month of January was \$29,000.00. The month of February was approximately \$22,000.00. The month of March was approximately almost \$22,000.00. And the month of April a little over \$15,000.00. Out of all that money are you telling this court there was no money, that none of that belonged to Uncle Sam, the United States, for taxes?

A. As I stated, as I stated about the previous four-month period, October, November, December and January, I had the same situation here. We had

(Testimony of Daniel Lawrence Abdul.)

outstanding checks against those deposits. And if they had all been cleared, obligations that I had to pay, and if I did not pay I would have been out of business.

Q. In effect you are stating, are you not, that you are remaining in business by the use partially of the money belonging to the United States, is that right?

A. I was remaining in business to try and raise enough capital to take care of all the obligations that we had, including [599] the taxes and other obligations such as salaries, rents, utilities, and the cost of doing business and paying for the merchandise that we were selling.

Q. And you acknowledge, do you not, that part of the money you were using was money which belonged to the United States?

Mr. Hoddick: Your Honor, I am going to object to the form of the question. It may have been money due to the United States but not belonged to the United States.

The Court: The objection is overruled.

A. Because it is my belief that we didn't have this money in the first place. As I stated earlier, we had trouble even cashing the net amount of the employee's salaries.

Q. (By Mr. Crumpacker): But there was money there, isn't that true?

A. I don't believe so, no.

Q. Well, are you saying, then, that these figures of the bank's are incorrect?

(Testimony of Daniel Lawrence Abdul.)

A. Oh, we had obligations that we had committed ourselves to meet.

Q. Didn't you include among those the taxes to the United States?

A. I included among those the obligations that we had to meet in order to keep our doors open. And if we didn't meet them we would have been closed up. [600]

Q. So then you figured that if you sidestepped the United States long enough you could stay in business, is that about the size of it?

A. I was trying to raise the money to pay the taxes as well as all the other obligations that we had.

Q. In connection with the second quarter of 1954 return, I note that the months of May, June and July show deposits of something over \$52,000.00. In our account with the American Security and the Central Pacific Bank. Are you stating or will you state at this time whether or not that money was also available to you to pay taxes with?

A. We constantly were overdrawn in our bank account on checks that had been issued on commitment to permit us to keep our doors open.

Q. And all this time, you acknowledge you kept the returns for the fourth quarter of '53, the first three quarters of '54 in your so-called holdback file, is that right? A. Yes.

Q. At the same time you were spending these monies which I have recited for other obligations?

A. Well, the obligations that I stated which would enable us to keep our doors open. [601]

SETTLING OF INSTRUCTIONS

(In Chambers)

The Court: We will go through the Defendant's requested instructions first. Numbers 1 through 12 will be refused. Number 13 will be given in substance. I think I have a general instruction on that.

Mr. Crumpacker: May I make a comment on 14?

The Court: Yes.

Mr. Crumpacker: And this comment applies to a number of subsequent instructions. The words "in an attempt to evade and defeat the tax" are not matters which apply to odd counts, certainly.

Mr. Felzer: We agree to that.

Mr. Crumpacker: Also at least as to counts 10 and 12 it is also not applicable. In view of the Spies case, I think that is something that we are faced with as I previously mentioned to the court. The Supreme Court discussed the statutes, 145 a or b or whatever it was, under the old Code. And they discussed the matter of attempt. However, your Honor, you will note that the wording of the statute is in the alternative with respect to an attempt or to fail to withhold, account for and pay over. And also in the new statute those sections have been separated, which clearly to me indicates an intent of Congress to require an attempt to evade or defeat the tax because they are in two separate sections. So it cannot be said now by the court or it couldn't be said by the Supreme [696] Court, it seems to me, that an attempt is necessary in the charge of wilfully failing to account for and pay over. So at least as to

counts 8, 10 and 12 I feel that that also is inapplicable.

Mr. Hoddick: Your Honor, I would like to comment on that. It is clear from the evidence that the defendant has not succeeded in defeating or evading the payment of taxes, or if there is any offense it will have to rely on proof of his attempt to do so.

Mr. Crumpacker: Well, the offense is committed at the time the tax is due, your Honor. That is the question. I think it has been confused all through by defendant's counsel in point of having it ultimately paid. They paid under duress only. And the question is, what was the intent at the time the tax was due?

The Court: Isn't this matter covered substantially by one of your instructions?

Mr. Crumpacker: Yes, it is.

The Court: We will pass Number 14 for the time being.

Mr. Crumpacker: I think Number 15 was a motion——

The Court: Let me lead this discussion, Mr. Crumpacker, and we will make it more orderly, I believe. Number 15 as submitted will be refused. Is there any objection to Number 16? [697]

Mr. Crumpacker: I don't know whether there was any such evidence. If there was, I guess it is all right. Yes, there was some, yes.

The Court: In other words, no objection?

Mr. Crumpacker: No objection.

The Court: Number 17. Is there any objection?

Mr. Crumpacker: I had in the back of my mind,

although I didn't get a chance to check on it, the words next to the last paragraph "inconsistent with every reasonable supposition of innocence." I had in mind that wording was more or less frowned upon recently by some courts and I can't place just where. Other than that, I have no objection. The only other thing is that this, added to the others, I think I counted 15——

The Court: Mr. Crumpacker, as I said, if I can lead this discussion we will move along a lot faster. We will take them up as I call them. Number 17 will be given in substance. Number 18 likewise will be given as submitted or in substance. Any objection to 19?

Mr. Crumpacker: No objection.

The Court: Number 20?

Mr. Crumpacker: No objection.

The Court: Number 21?

Mr. Crumpacker: No objection.

The Court: Number 22? [698]

Mr. Crumpacker: Only that it is covered by Defendant's 13 in a much broader sense. It is repetition. Other than that, we have no objection.

The Court: But you have no objection to the substance?

Mr. Crumpacker: No.

The Court: It will be given in substance. Number 23?

Mr. Crumpacker: No objection except that it is given also in Number 24. I think it is repetitive. They are all invitations to acquit.

The Court: Numbers 23 and 24 cover the same subject matter?

Mr. Crumpacker: Yes. And they are also covered in Plaintiff's Number 16.

Mr. Felzer: We will withdraw 24, your Honor.

The Court: Number 25 will be given in substance.

Mr. Crumpacker: May I suggest that there is a wording in there "must prove its case without any doubt," and I think there is a reasonable doubt that at least should be in there.

The Court: As I say, I will give it in substance. Likewise Number 26. I am not going to repeat a lot of this.

Mr. Felzer: I understand. But we had no way of knowing. [699]

The Court: Number 27. Is there any objection?

Mr. Crumpacker: I don't think that is correct in the first place, your Honor.

The Court: What is your authority for that instruction?

Mr. Hoddick: Your Honor, it is a general proposition of law that Section 7602 only requires that a taxpayer answer questions where he is called in under summons.

The Court: Well, then, this is not complete.

Mr. Hoddick: But there is no evidence of a summons ever having been issued in this case. That point does not arise.

The Court: There is no evidence that there has been any refusal on the part of the taxpayer to answer any questions.

Mr. Hoddick: Well, your Honor, the refusal on his part to produce books after they had the conferences with Mr. Winter and the other agents in the office, and the last time that Mr. Fiellin went back and tried to get documents.

Mr. Crumpacker: The production of books is entirely different.

Mr. Hoddick: That is covered by the same section of the statute, your Honor.

Mr. Crumpacker: Well, I refer to the regulations. But we will come to that later on. I don't think this has anything [700] to do with the production of books.

The Court: I will pass Number 27 for the time. What have you got to say on 28?

Mr. Crumpacker: Again this refers to Section 7602. It is not material in this case.

Mr. Felzer: Section 7605.

Mr. Crumpacker: No, 7605 refers to 7602, an examination which 7602 contemplates. And that is the examination by way of subpoena, and so forth, so I don't think this is material at all to this case.

Mr. Hoddick: That is not quite correct, as I recall the section, your Honor. I can summarize it. The first section authorizes the secretary or his delegate to make examinations. And if in the course of making them they need the assistance of a summons, that authority is granted to use the summons. And Section 7605 relates generally to the examination regardless of whether there is a summons or not.

The Court: Well, do those sections have any

applicability in this case where there were no summons or subpoenas?

Mr. Hoddick: Yes, your Honor, we submit that the general power and authority of employees or delegates of the secretary to examine a taxpayer's books or records or to examine the taxpayer are contained in those provisions, 7602 or 7601 through several sections there. In fact, it states in the first statute in the section, it starts off with the general [701] authority.

The Court: Again I think this all hinges on the issuance of a summons. You have no evidence of any summons. That procedure was not followed.

Mr. Hoddick: I don't have the statute——

The Court: Well, I am just examining it.

Mr. Hoddick: My recollection is that there are two different types of examinations that are contemplated. You have here general authority to examine books, papers, or records which we did here. And, secondly, to use the summons if necessary.

The Court: That is as far as we go. From there on it is all procedure following the summons, including the limitation contained in 7605(b).

Mr. Hoddick: We submit that 7605(b) does not contain any such limitation. The section as a whole refers to all of 7602.

Mr. Crumpacker: May I suggest something, your Honor?

The Court: Yes.

Mr. Crumpacker: Referring to Plaintiff's In-

struction Number 11, saving regulations 116, 120 and 128, which all provide that the records must be kept by the employer in a convenient and safe location accessible to the Internal Revenue officers, and open for inspection at all times, and I think that certainly is the interpretation of the Revenue Service under the [702] existing statutes which are applicable. I think that bolsters the court's feeling that this is not applicable to this case.

Mr. Hoddick: The regulation may so provide, your Honor, and in fact we know that they provide that records will be kept and be available at all times. But that is not within the limitation of the statute as to the number of times the agents of the Internal Revenue Service can ask to examine them during a single taxing period.

The Court: Well, I am going to pass Number 28 for the time with the feeling that I am going to refuse it. But I will allow you to be heard. Number 29.

Mr. Felzer: Number 29, we want to change the word "refusal" to "failure" on the second and fifth lines.

Mr. Crumpacker: What is that?

Mr. Felzer: The word "refusal" to the word "failure."

The Court: What do you have to say to that?

Mr. Crumpacker: I think it is clear from Section 7203 that that is a violation. I think the instruction is just all wet. As a matter of fact, I again refer to Plaintiff's Number 11.

The Court: Well, I am not concerned about the

dampness of the instruction. I am only concerned about its correctness. What is your objection?

Mr. Crumpacker: Well, it is just a misstatement of the law, your Honor. It is a violation of Section 7203, in [703] view of the regulations.

The Court: I think the instruction as offered is not a correct statement of law as applicable to this case. It will be refused. I think the same is true with Number 30. It will be refused.

Mr. Felzer: Section 7202 indicates that these acts must be wilful.

The Court: Well, there is evidence of wilfulness.

Mr. Hoddick: Your Honor, on Number 30 we submit that the language contained in the cases which discuss wilfulness in connection with tax violations, the rule of law is not established. In fact, it appears otherwise, that the relations of the taxpayer to the investigating agent of the Internal Revenue Service constitutes evidence of wilfulness or lack of wilfulness. Wilfulness lies in what was in the manner, as appears from those cases, evidence of what was in the man's mind at the time that he failed to make the return at the time. And this brings up the same subject which we objected to in a number of Plaintiff's instructions.

The Court: Well, I will pass Number 30 and we will discuss that—with which one?

Mr. Hoddick: Well, we have three or four of them.

The Court: Number 31. Any objection to that?

Mr. Crumpacker: That is the same objection as

earlier, the wilfulness or bad purpose is an incompleting instruction, [704] particularly with respect to the odd counts. And I would suggest that this is covered by Plaintiff's Number 7.

The Court: Well, I think the substance of it has to be given and will be given. Whether it will be singled out in this particular fashion, I can't say, so I will pass it for the time being. But it will be given in substance. And I think as to Number 32, the general subject matter will be covered.

Mr. Felzer: You mean that will be given in substance?

The Court: Yes. And Number 33 will be given in substance. I think I have instructed the jury throughout on that general subject matter. What do you have to say as to Number 34?

Mr. Crumpacker: No objection.

The Court: I think the subject matter is covered—this is Number 35.

Mr. Crumpacker: Yes, your Honor. Again it confuses the two different types of offenses.

The Court: Well, I will pass that for the time being. Number 36 will be refused. Here again on the definition of wilfulness. And Number 37, I will pass that for the time. And likewise 38 and 39. What do you have to say as to Number 39?

Mr. Crumpacker: I think there is something left out in the first place, somewhere in the first line or the first [705] clause. But aside from that, I am wondering if there is any evidence of this latter part which would bear on that. I can't think of any.

The Court: Including conversations had with third parties or statements made?

Mr. Crumpacker: Yes. To buttress the statements with testimony of relevant circumstances.

The Court: Well, those are the conversations had with the Internal Revenue Agents, I take it.

Mr. Hoddick: Also with his other creditors, your Honor, rearranging his financing.

Mr. Crumpacker: Well, yes, if there is any evidence of such, I have no objection to it. I just couldn't think——

The Court: Well, I think there is lots of evidence on that, and that is the basis of his defense, as I understand it.

Mr. Crumpacker: But I would suggest that there is something incomplete in the first place. It doesn't seem to make sense to me.

Mr. Felzer: This is taken verbatim from the instructions in the Foytich case.

Mr. Crumpacker: Are you sure there isn't something left out?

The Court: Well, you can check it.

Mr. Felzer: I checked it over. [706]

The Court: I will give you an opportunity to check it. You say it was from the Foytich case?

Mr. Felzer: Yes.

The Court: Number 40. You are asking the court to substitute its judgment for that of the jury and to give a judgment of acquittal on all counts.

Mr. Felzer: Well, that is the strong point in our case.

The Court: Number 40 will be refused. Number 41.

Mr. Felzer: The word on the second line should be "abrupt." And on the fourth line it should be "revenue."

The Court: Number 41 will be refused. Number 42 will be refused. Number 43 is not a correct statement of the law. It is not a correct statement of the law applicable to this case and it will be refused. What do you have to say as to Number 44, Mr. Crumpacker?

Mr. Crumpacker: No objection except the last phrase. I think this was taken from the Foytich case and rewritten a little bit. The last phrase, as I recall, in the Foytich case was "if you take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and determine from such facts and circumstances what the intent was." And in here is it whether the defendant acted with criminal wilfulness. I believe as I stated that that is the way it came from the Foytich case.

Mr. Felzer: It is taken from the Foytich case, your Honor. Mr. Hoddick is checking it.

The Court: While you are checking that, I understand, Judge Hawkins, that you are going to address the jury on behalf of the defendant?

Judge Hawkins: Yes, your Honor.

The Court: I don't know how you handled this when you were sitting on the bench, but it is my preference that counsel in arguing to the jury do not state that the court will instruct you as follows, but rather to this effect, that the court will instruct

you in substance. In other words, instead of taking it verbatim, you may use verbatim if you want to——

Judge Hawkins: To this effect.

The Court: That's right. Was that your practice?

Judge Hawkins: Yes, sir.

The Court: I have asked the attorneys appearing in my court to do that. It is preferable. Now, have you found that?

Mr. Felzer: Yes, your Honor. It is a little different. It says, the question of intent is a matter for you jurors to determine. Intent is a state of mind and it is not possible to look into a man's mind to see what went on. The only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all the facts and circumstances shown in the evidence, including the [708] exhibits, and determine from such facts and circumstances what the intent of the defendant was at the time in question.

Mr. Hoddick: Your Honor, on that subject we have these instructions and covered them pretty well and substituted the word "wilfulness" for "intent." That is the word that appears in the statute. "Wilfulness" is a hard enough subject to grasp the meaning of without throwing it in by way of a synonym.

The Court: What do you have to say to that, the substitution of "wilfulness" for the word "intent," Mr. Crumpacker?

Mr. Crumpacker: I think it is two different

words. I think "wilfulness" is determined through "intent." And trying to make a substitution, it is sort of taking two steps in one.

Mr. Felzer: Except for the fact, your Honor, that every one of these sections uses the word "wilful."

The Court: Well, most of the statutes say "wilful" and that goes to the question of intent, the state of mind.

Mr. Felzer: Well, we tried to use the language of the statute as much as possible. I can't see anything wrong in the language of the statute, in using that. Even in 2707(b) and (c) the word "wilful" is used in every case, in all four of these sections.

The Court: Yes. Well, it is used in 7201, which is your prime income tax evasion statute. Well, the general, the [709] subject matter of this must be given. Whether the word "intent" will be used or "wilfulness" in lieu of "intent" or whether they will be used interchangeably, I can't say at the present moment. So I will pass that. But you agree, Mr. Crumpacker, that the subject matter of it must be given?

Mr. Crumpacker: Yes. I suggest that it is in one of mine.

The Court: Number 45. I do not think 45 is a correct statement of the law applicable to the facts of this case. I will refuse to give it. The subject matter of Number 46 is necessary to the case. I will pass that for the time being. The subject matter of 47 will be given. I have a general in-

struction on that subject matter. Number 48 will be refused. Have you had time to enlarge upon Number 49?

Mr. Hoddick: Your Honor, we haven't had time. May we offer as a substitute for 49 the instruction as given in *United States versus Fujimoto*? I think Your Honor probably has a copy of it. And to be given in its entirety.

The Court: I think I do. I will ask my secretary for it. Number 50.

Mr. Felzer: This I am almost certain is taken from—we will withdraw Number 50.

The Court: Number 50 may be withdrawn. Number 51 will be given in substance. Number 52. If I should make such a statement, I will give in substance Number 52. And something [710] to the effect in Number 53. Number 54 will be refused. Now we have the Plaintiff's instructions. Any objection to Plaintiff's Number 1?

Mr. Felzer: Yes, your Honor. Paragraph 2 which refers and cites as its authority 2707(c) doesn't follow the language of the section insofar as that section is concerned. It leaves off the element of wilfulness entirely, and with reference to the attempt to evade or defeat any tax imposed because three of the counts specifically refer to 2707 and since they cite that as the authority it should be cited in full with reference to those three counts.

The Court: That is the only one you submitted with law involved——

Mr. Crumpacker: I have submitted ones on the gist of the offense which come later. As I see this,

it was intended at least to be the wording of the statute which involves the charge in the indictment. The only question lies in the word "wilfulness." And that is later defined.

The Court: Well, what was your specific objection in the second paragraph? It is not a complete statement of the law. That is clear. But what elements do you think are prejudicial because they are omitted?

Mr. Felzer: It is prejudicial because the sections cited refer to felonies and the essential allegation of the felonies are not included in the language. Maybe if they were [711] referring to a misdemeanor it might be adequate. But they cite both sections which are felonies. And the essential allegations of the felonies are missing, or at least not complete enough to cover 2707(c). If you separate that and use the language of 2707(c) in one and 7202 in the other—but to place them together when the elements are not the same, the jury might see fit to hold them guilty or not guilty on one of the sections and not on the other. But here you have got them both placed in one, each of which covers three separate counts.

The Court: Well, perhaps it is best that we remedy that by reading the pertinent parts of the statute.

Mr. Hoddick: As to the particular counts involved.

The Court: Well, in view of the fact that there has been a change with regard to the statutes, will you give me that information off-hand—or can you

—2, 4, 6 and 8 are under the old statute, and 10 and 12 under the new?

Mr. Felzer: 8, 10, and 12 are under the new, and 2, 4, and 6 under the old; 8, 10 and 12 are under the new one, under 7202.

The Court: That is true also of misdemeanors?

Mr. Felzer: Yes, 1, 3——

Mr. Crumpacker: There is not any change in that regard.

Mr. Felzer: Not in that regard but they are different. And because 7203 they omit the use of the words at the [712] time or times required by law or regulations.

Mr. Crumpacker: Well, it has to give information——

Mr. Felzer: Pardon me, your Honor. Those words do appear there but at different points. The only change is that they include the words “to pay such estimated tax or taxes.” That seems to be the only phrase that has been added in the new code. They included the estimated tax return which, of course, is not involved here.

The Court: Well, then, you have no objection to the first paragraph?

Mr. Felzer: Not to the first and not to the last, but it is the second paragraph. That is the only one we do object to, your Honor.

Mr. Crumpacker: May I make a statement?

The Court: Yes.

Mr. Crumpacker: In 2707(c) you will note that it reads in the alternative with respect to evade and failure to account for and pay over. In the new

code those two, the part there that is in the alternative, has been placed in two separate sections. And your Honor is well aware that there may be many offenses set forth in any one statutory section. There is no charge here of evasion, although we agree that that matter comes in as far as the matter of intent, wilfulness is involved. But as you will note in the statute, it reads in the alternative. And the charge is only as to the latter half—or [713] I don't know which half.

The Court: There will be no question about it if I read the pertinent portions of 7207 and 7203.

Mr. Felzer: 7202 relates to the wilfulness.

The Court: 7202. I beg your pardon. Very well. Now, Number 2.

Mr. Felzer: There is no objection to Number 2, your Honor.

The Court: Number 3?

Mr. Hoddick: We submit as to the third one, the first sentence of the second paragraph, you don't have any place in the evidence—we have testimony as to what the procedure is that was followed and it will be for the jury to determine whether the procedure was or was not followed in particular cases, and particularly the pertinent ones, what the regulations may provide——

The Court: You have no objection to the first paragraph?

Mr. Hoddick: No; we don't.

The Court: Is this important, Mr. Crumpacker?

Mr. Crumpacker: Well, I felt that there was some attempt primarily in cross-examination to

cloud the issue of whether or not the forms were sent out or whether he had the forms or not. For that reason I thought it appropriate to put [714] it in.

The Court: Well, your first paragraph covers the subject matter on requirement of the statute. And there is room for argument on the evidence in connection with that, in connection with that second paragraph.

Mr. Crumpacker: Well, that is true, but that is the reason I wanted to put it in, because the regulation indicates—there is no excuse if the return is not produced. And I think that is a cloudy area in the evidence. And that is the purpose of putting that in there.

The Court: You do not contend that the regulations do not so provide?

Mr. Felzer: Well, I don't know about the exact language of this particular section. But I don't think the defendant here has made an issue of that particular point. So if it is irrelevant, it shouldn't be given.

Mr. Hoddick: I think Judge Hawkins is going to make the argument, but we will state now that we are not going to argue to the jury that he is excused for having filed the returns on time because he didn't get them on time from the Internal Revenue.

Mr. Felzer: I don't think it ever was that way.

Mr. Crumpacker: Well, I just had the impression that some attempt was to be made in the cross-

examination of Mr. Mew. And I thought this would help clear it up.

The Court: I don't think it is very vital either way, [715] but I will give the defendant a break by deleting the second paragraph. Number 3 is all right. Number 1 is all right.

Mr. Felzer: No objection to Number 4, your Honor. On Number 5, your Honor, we have no objection basically except as to the last clause which says, "without ground for believing that his act was lawful, or without reasonable cause, or capriciously, or with a careless disregard whether he had the right so to act." The citation there refers to a civil case rather than to a criminal case. That is *Kellems versus United States*. And we feel that the burden is far greater in a criminal action than in a civil case such as in the *Kellems* case, of course. We would rather object to the entire instruction 5 on that basis.

Mr. Hoddick: Your Honor, the other citation, *United States versus McCormick*, also does not contain language that we object to in this instruction.

Mr. Crumpacker: This may be an erroneous citation. I don't recognize the names of the cases but I could find them. I could find the proper case, I know. This, as a matter of fact, is a type of instruction that has been approved by the courts in all respects with regard to the failure to file. And that is the point. And to make a distinction, particularly the careless disregard, whether he has a regard as to some act, and without grounds for believing that his act was lawful——

The Court: Well, that would come in again in the [716] instruction on defining wilfulness. Stop right there. Failure to file such returns was wilful, and then if we are going to define "wilful" I don't want to repeat it several times.

Mr. Crumpacker: Well, that would be fine. That is, in other words, stop there. That failure to file was wilful as I will define it to you.

The Court: All right.

Mr. Felzer: But if the use of the words "with a bad purpose" is in the case——

The Court: Well, we will get to that in a minute. But failure to file such returns was wilful.

Mr. Felzer: That was our basic objection to the instruction, your Honor.

The Court: I will cover that. That will be covered with a definition, with a definition of the word "wilful." And, as amended, there is no objection? Number 6.

Mr. Felzer: Here again, your Honor, except for the second line, to use the word "escape" where the statutory word is "evade"—they don't denote the same degree of wilfulness. "Escape" and "evade" are different——

The Court: What do you have to say to that?

Mr. Felzer: ——since he is referring specifically to the felony counts, 2, 4, 6, 8, 10 and 12.

Mr. Crumpacker: "Evade" or "escape" is all right with me. [717]

The Court: No objection as amended? By changing the word "escape" to "evade"?

Mr. Felzer: Yes, your Honor.

Mr. Hoddick: In Number 7, your Honor, we get into the heart of what the correct definition of "wilful" is. And I have read all the cases that are cited by Plaintiff's counsel in support of the propositions and we submit that none of them give a definition such as he sets forth here, as a matter of fact. I think it was in the Forester case where they took exception to the use of the words "with careless disregard" which were given in the lower court. That would indicate that this is not a correct definition of "wilfulness."

Mr. Crumpacker: Yes, but that was an evasion case, your Honor, and that is the distinction. This is in connection with failure to file. And he points out that the standard is entirely different. As a matter of fact, in the Foytich case Judge Murphy included in the case "with careless disregard."

The Court: Well, if it was all right in the Forester case, it was the position in which it was given——

Mr. Hoddick: But, your Honor, in the Spies case and the Murdock case and even in this Paschen case, another evasion case, they go to the bad purpose and the evil motive definition of "wilfulness."

Mr. Felzer: Referring specifically to the felony charges. [718]

Mr. Crumpacker: No; I am not. This is referring to the failure to file.

Mr. Hoddick: Well, you are talking about your definition of "wilfulness" in the second paragraph in your instruction.

Mr. Crumpacker: Isn't that what you are talking about?

Mr. Hoddick: I am talking generally about the definition of "wilfulness" but restricting it to the first paragraph. I don't think that either the Murdock case or certainly not the Kellems case support your proposition that Congress meant and intended one thing by the use of the word "wilful" in one statute and another thing in the word "wilful" in a felony statute.

Mr. Crumpacker: I think that is clear in the Spies case.

The Court: Just a moment. Here is the definition. Read it carefully or listen carefully. The word "wilful" as used in Count 1, and so on, means with a bad faith and evil motive to voluntarily and purposely act with a specific intent not to do that which the law requires. And that is, to make a timely tax return.

Mr. Crumpacker: May I comment on that?

The Court: Yes.

Mr. Crumpacker: I think that is one hundred and eighty [719] degrees opposed to the correct law, because the specific intent is not required in the misdemeanor counts.

Mr. Felzer: We contend differently, your Honor. That is exactly the same intent that is required.

Mr. Crumpacker: Every case discussed, every case we have been discussing, the felony type charge is there and that is the whole gist of the Spies case. And they point out that there is a different standard.

Mr. Felzer: We believe and I think we tried to make it clear to the court in our arguments before that we feel it is exactly the same, that wilfulness is required in both the misdemeanor and the felonies, the distinction being that there are additional elements required to establish the felony such as a wilful evasion or a wilful attempt to defeat the tax. And those are the only matters which make a difference from a misdemeanor. Those are the outstanding differences. And we don't have any such evidence here. So far as the wilfulness is concerned, it is the same wilfulness that is required in both the misdemeanor and the felony. And every time we mention the word "wilfulness" we include the accompanying phrases "with bad purpose" and "evil intent," because our interpretation of the cases is that it is the same wilfulness that must be shown in each case. And it must be shown beyond all doubt obviously that before they could charge the felony there would have to be the essential elements of the felony which go beyond the [720] mere wilfulness.

Mr. Crumpacker: May I read from the Spies case, your Honor?

Mr. Felzer: The Forester case discusses the Spies case and yet reaches a different conclusion.

Mr. Crumpacker: But the case is only a felony case.

Mr. Hoddick: So was the Spies case.

Mr. Crumpacker: There was a distinction between the wilfulness involved.

The Court: Do you have the Spies case there?

Mr. Crumpacker: Yes. (Handing a book to the court.) It uses the words "passive neglect."

Mr. Felzer: They use the term "affirmative and positive acts."

Mr. Crumpacker: That's right, as distinguished from a misdemeanor.

The Court: What are your objections as to the felony counts in the third paragraph of Number 7?

Mr. Felzer: It doesn't use all of the language of the statute. It only picks portions of the statute.

Mr. Hoddick: Your Honor, another objection I think would go to the last portion of that paragraph. In the Spies case they refer to certain evidence. That is in effect what Mr. Crumpacker has done here. But, as I recall, all that evidence had to do with keeping a double set of books and that [721] sort of thing which was designed to conceal the true tax liability of the taxpayer. I don't think the last part of the second paragraph has any application to the case in hand.

The Court: Well, what is wrong with the Forester instruction leaving the word "disregarding" as to the misdemeanor counts—I said, "misdemeanor"—

Mr. Crumpacker: Well, the Forester instructions were in a felony case.

The Court: I know that. What is the objection to them as to the misdemeanor?

Mr. Crumpacker: Well, as I pointed out, the standard in a felony case as demonstrated in the Spies case is entirely different.

The Court: They say that in a sense. But passive

neglect of a statutory duty may constitute the lesser offense.

Mr. Felzer: And it says further that it must be established insofar as the felony is concerned by some affirmative or positive act specifically indicating bad purpose.

Mr. Crumpacker: Well, that is included in that instruction as written.

Mr. Felzer: Except that it is not in the right place.

The Court: Well, I will tell you what I am going to do on that. I am going to give it as offered by the Government in the second paragraph of Number 7 and then I am going to give the instruction from Forester deleting the reckless disregard [722] of the law as to the other paragraphs.

Mr. Hoddick: Your Honor, as to the Plaintiff's Instruction Number 7 as to the other paragraphs, I was talking about the third paragraph and I will withdraw that.

The Court: Very well. As to the remainder of the instructions, there are any objections?

Mr. Hoddick: As to the third paragraph, we object to the phrase "the likely defect of which would be to mislead or to conceal."

The Court: Well, as I say, I am going to give the instruction from the Forester case in lieu of it.

Mr. Hoddick: In lieu of the third paragraph?

The Court: Yes.

Mr. Hoddick: I see.

The Court: The fourth paragraph——

Mr. Hoddick: I only have a suggestion to make

there, your Honor, and that is that for simplicity and lack of confusion for the jury the word "wilfulness" be substituted for "intent" in the second line, and in the third line and in the fifth line it be changed to read "the only way that you have of arriving at whether the defendant acted wilfully in this case is for you to" and so forth. Perhaps it is a matter of form but I think this is trying to grasp two concepts that they may get confused about.

The Court: Well, I may or may not change it. Your [723] objection will be noted. Now, Number 8.

Mr. Hoddick: I think there is an awful lot of comment in that instruction, your Honor, on the evidence by way of an assumption and the fact that it does or does not establish something.

Mr. Felzer: To the degree to which the evidence is commented upon, coming from the court, it might give the jury the impression that those are the court's conclusions.

Mr. Hoddick: I think it would.

Mr. Crumpacker: That type of instruction was given in the Forester case and not commented on, as well as in the Paschen case or the Lustig case.

Mr. Felzer: What counsel has done here was to make part of his closing argument rather than an instruction of the court, and being included in the instruction it does just give the jury the impression that it is the court's conclusion rather than a discussion of the evidence by counsel in a closing argument.

Mr. Hoddick: My understanding is that in the

Lustig case the question of instructions was not involved and it was a search and seizure case primarily.

Mr. Crumpacker: Well, these were taken from the records of the Lustig case, the trial court record as well as portions of it were taken from the Foytich case, as a matter of fact. [724]

Mr. Hoddick: None of it commented on the evidence.

Mr. Crumpacker: About three or four of these were taken directly from the Foytich case, from the instructions. And the Forester case has the same type of instruction.

Mr. Felzer: If the court please, even in the last clause at the bottom of the first page it definitely reaches a conclusion and says that even if the tax evasion motive plays any part in such conduct—it states a conclusion.

Mr. Crumpacker: And if you find—I would be willing to amend that. There is no argument to that.

Mr. Hoddick: We submit, your Honor, that it constitutes too much comment on the evidence by the court to the prejudice of the defendant in outlining this evidence to adopt the instruction because you assume that his statement to others reflects his attitude towards his tax obligation. That was suppressed evidence, and that he was evasive when interviewed, that he made consistently contradictory statements, that he misrepresented the taxes which had been paid——

The Court: I will not give Instruction Number 8 at all. I have not made it a practice in the past to

comment on the evidence and may not in the future, but if I am going to comment on evidence I am going to do it by way of summarizing both sides and not concentrating on one side or the other. I want to be fair.

Mr. Crumpacker: Well, this wouldn't preclude me from [725] arguing?

The Court: It certainly will not. But I am not going to buttress the argument, let's put it that way.

Mr. Crumpacker: Well, may I ask that the instruction be given, then deleting the illustrations being given, because on something like on the question of intent you may consider all the testimony which you received?

The Court: That is covered.

Mr. Crumpacker: Well, I would like the words somewhere in the instruction "and conduct the likely effect of which would be to mislead or conceal." Now, that was stricken from the previous proposed instruction.

The Court: Where was it stricken?

Mr. Crumpacker: Paragraph 3.

The Court: From Number 7 of paragraph 3?

Mr. Crumpacker: Yes.

The Court: No; I am going to give a rather full instruction on that. I am going to take it verbatim out of the Forester case, which is rather lengthy.

Mr. Crumpacker: Well, I believe the Forester case has the same type of instruction as this. What is the court's intention? Is it the court's intention to give that part of it? I understand that in that

case a similar instruction pointed to evidence presumably which was received in that case.

The Court: No; not in this one. Well, I am not going [726] to give that portion of it, but only that portion relating to defining "wilfulness" as used in the statute. And that is on the felony counts.

Mr. Crumpacker: Could there be some words somewhere in the instructions with regard to conduct, the likely effect would be to mislead or conceal? That is what I am asking for somewhere. It has been stricken now from two instructions and that is the standard which the Spies case sets forth.

Mr. Hoddick: Yes, but with reference to the day to day books and concealment of true tax liability of the taxpayer, not with reference to what he may or may not have said or said to the representatives of the Revenue Service when they came around to see him.

The Court: That is covered with this last paragraph of Number 7, that the question of intent is a matter for you as jurors to determine and as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way that you have of arriving at the intent of the defendant in this case is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and determine from all facts and circumstances what the intent of the defendant was at the time in question. And going on. Now, Plaintiff's Number 9.

Mr. Felzer: Well, the objection I have to the first paragraph is this, your Honor: In 7207(c),

which is the original [727] felony charge, there is a greater degree or a greater number of essentials necessary to establish the felony. In 7202 they eliminate the evasion and delete the tax features of the felony and remain with the wilful failure and truthfully account for. But at the same time that language, your Honor, is exactly the same language that exists in the misdemeanors. And in some of the cases that I cited in the motion to acquit and in the motion to strike, those felony counts indicated that in such cases where the elements of the felonies are the same as the elements of the misdemeanor, that it must be the misdemeanor that is intended and not the felony. And this tends to mislead, therefore, that these are properly felony charges rather than misdemeanor charges. That would affect three counts of the indictment, your Honor.

Mr. Crumpacker: Well, I point out, your Honor, that "wilfulness," as you have already defined it, you have to assume that the jury has assumed that the definition of "wilfulness" is applied to each count.

The Court: Well, what are you trying to get at in this instruction, that each count is a separate offense?

Mr. Crumpacker: Yes. And that it is completed at the time when the taxes, when the returns are due and the taxes are due, and not to avoid or rather to avoid the confusion which I expect will come, as it has, already in argument, in argument of defense counsel, and maybe in the minds of the

jury [728] that late payment might absolve them of the crime.

The Court: Well, I couldn't say that if all of the requisite elements of the crime are present, or could I say the crime is complete at the time the returns required to be filed or the taxes required to be truthfully accounted for and paid over, could I say words to that effect? That is what you are getting at, is that correct?

Mr. Crumpacker: Well, yes. And that each is a separate offense.

The Court: And each is a separate offense?

Mr. Crumpacker: That's all.

The Court: What do you have to say to that?

Mr. Felzer: Well, that is quite different from what he originally stated. He stated that he intended to indicate that each count is a separate offense. If he says that, that is correct.

The Court: Each count contains a separate offense and if you find all of the requisite elements of the crime are present, completed at the time as to each count, the offense would be completed at the time the return was to be filed or at the time the tax was to be accounted for and paid over, in other words, at the conclusion of the end of the first month following the quarter?

Mr. Felzer: Except that in the latter part of the instruction which you gave orally it indicates conclusions or [729] might tend the jury to assume that those are conclusions.

The Court: No; if all the requisite elements are

found, then the time element—I suggest that you submit one along that line.

Mr. Crumpacker: Well, I am not quite sure wherein it is suggested it be changed.

The Court: What you are getting at, as I understand, is that the allegations contained in each count are separate offenses. And if all of the requisite elements of the crime have been proved beyond a reasonable doubt, then the crime is completed at the time when the return is required to be filed, or in the other counts at the time the tax is required to be truthfully accounted for and paid over.

Mr. Felzer: Except for the fact, your Honor, that the act must be wilful.

The Court: Yes. That is one of the requisites. Now, Number 10. Let me interrupt a minute. I think that you are right about the time. I am always optimistic. Do counsel have any objection to my directing the bailiff to excuse the jury until 2:00 o'clock?

Mr. Hoddick: No objection.

The Court: Very well. Will you excuse the jury and tell them to return at 2:00 o'clock, abiding by my instructions at all times.

The Bailiff: Very well, sir. [730]

Mr. Crumpacker: To go back to Number 9, may I suggest this as a substitute, then, for the first paragraph amending the second paragraph to read “if all the requisite elements of the crime as charged have been proved to you beyond a reasonable doubt, including the wilfulness as defined, the crime is completed at the time the return is required to be

filed and the taxes truthfully accounted for and paid over''? In substitution for the first paragraph of the standard instruction that we must find a verdict to each separate count. In other words, substituting the standard instruction for that.

Mr. Hoddick: Well, that will be in the court's general instruction anyway.

The Court: Yes.

Mr. Crumpacker: But I would like this last part to be included, "in determining the elements of intent involved in each count, you may consider all the elements of the case." Because, you see, there may be an inference there that in the instruction that because the crime is complete they might note that nothing had happened after, but it does have to do with the intent of the defendant. So the last two paragraphs as modified I would like them to be given, in connection with the court's standard instruction on separate verdicts on each count.

Mr. Hoddick: Your Honor, the last paragraph is covered by that last paragraph in Plaintiff's Instruction [731] Number 7.

Mr. Crumpacker: Well, that one is just a general instruction on intent. But my point here is that that is applicable to determining an intent with respect to each offense.

The Court: Well, I am pointing out the various counts again. I think it would be repetitious. I don't like to repeat. Now, let's get into the middle of paragraph 9 again. That is involving the requisite element of the crime, the requisite elements of

the crime have been proven beyond a reasonable doubt to your satisfaction.

Mr. Crumpacker: Yes.

The Court: I will see if I can smooth that out. Now, Number 10.

Mr. Hoddick: May I inquire of counsel whether he has any authority to support him?

Mr. Crumpacker: Well, this is practically a unique case. I don't think any other case is on the books on this subject. And all I can say is that this wording is copied from a manual of the Department of Justice relating to this type of offense. In other words, this is the position of the Department of Justice. And there are no reported cases on the subject.

Mr. Hoddick: We feel that the statute which is fairly accurately quoted in the first sentence is the law. But it is not evidence. And you jump from a statement of what [732] the law is to what the evidence in the case is. And I don't think the two hang together. In other words, it is the second sentence of the instruction that we take exception to.

The Court: Here again, isn't this second sentence in effect argument? It is a matter that can be argued.

Mr. Crumpacker: Well, actually I guess you would say it is similar to the matter contained in Number 8 which you have already refused.

The Court: I think so. And you have said here, as I mentioned to you, taxes withheld are required to be held in a special fund in trust for the United States. Do you have another instruction on that?

Mr. Crumpacker: Yes. That is already in. You have already passed that, your Honor. That was right at the beginning, Number 2, the last paragraph of Number 2.

The Court: Oh, yes. I don't pay as much attention to those if counsel don't object to them. (To the bailiff): You have excused the jury?

The Bailiff: The jury has been excused pursuant to your orders.

The Court: I will refuse Number 10. Number 11.

Mr. Felzer: Here again, your Honor, in paragraph 2—we don't have any particular objection to paragraph 1 which appears to be a citation of a regulation—but the comments in paragraph 2 say that "may be considered in your [733] determination of his guilt or innocence." But it doesn't say of what. It is such a generality that it is prejudicial to the defendant in that it doesn't specify what exactly they are talking about.

Mr. Hoddick: Furthermore, your Honor, we submit that the Spies case doesn't stand for the proposition contained in the paragraph. There may have been a summons issued and he didn't respond, and it may be a violation of another section which makes it a crime not to obey the summons.

The Court: I will give paragraph 1. Now, Number 12.

Mr. Felzer: We object to 12 inasmuch as we consider it irrelevant and misleading. This statement deals with civil sanctions only. We are not concerned with civil sanctions.

Mr. Crumpacker: That is just what it says.

Mr. Felzer: But it also says that there is no burden on the part of the Government to prove its case beyond a reasonable doubt. The converse is true. Not only must they prove it beyond all reasonable doubt but beyond all doubt.

Mr. Crumpacker: You don't read it correctly.

The Court: No; that is in the civil section.

Mr. Hoddick: Isn't it confusing to the jury, your Honor, to tell them what the standards are with reference to imposing civil penalties?

Mr. Felzer: If it is confusing to me, it certainly is going to be confusing to the jury. [734]

Mr. Crumpacker: I would favor eliminating the second sentence.

The Court: Very well, delete the second sentence.

Mr. Felzer: Without the second sentence it makes a difference.

The Court: Very well. No objection? Number 13.

Mr. Hoddick: May we simply inquire as to whether the court is going to give its customary instruction?

Mr. Crumpacker: I think the court has this one in its file. I just wanted to make sure it was given.

The Court: No objection to Number 13?

Mr. Hoddick: No.

The Court: Number 14.

Mr. Felzer: That again is a general instruction, your Honor, that may be covered in what the court expects to give.

The Court: I think mine is more complete.

Mr. Hoddick: I was going to say that this is sort of one sided. This should go with something in prior statements that are consistent with this.

Mr. Crumpacker: I thought it was what the court——

The Court: I will give this in substance. I am sure it is covered by my own instruction. Number 15.

Mr. Felzer: No objection, your Honor.

The Court: Number 16. [735]

Mr. Hoddick: I think if the court gives its standard instruction——

The Court: I think this is my instruction. Anyway, I will give this in substance. Have I, during the course of this trial, used any language which seems to reflect upon any counsel?

Mr. Hoddick: Not yet, your Honor.

The Court: Well, in the event that I do, I may give this instruction, Number 17. Now, Number 18.

Mr. Felzer: You are giving 17?

The Court: It isn't necessary. Number 18. Isn't that in effect covered by prior instructions that civil liberty has nothing to do with criminal liability?

Mr. Crumpacker: Number 12 covers it more generally. This has to do with investigations, assessments of penalty.

Mr. Hoddick: Well, the only difference is the inclusion of investigation. Do you think the jury is going to know whether these investigations were conducted at one stage for civil purposes and another stage for criminal purposes? It is repetitious.

Mr. Crumpacker: That has to do with the collection of taxes, penalty.

The Court: So that no inference can be drawn that the settlement of a civil case precludes the bringing of a criminal action. Is that what you have in mind? [736]

Mr. Crumpacker: Yes.

The Court: I will give this in substance. Number 19.

Mr. Hoddick: As to 19, we submit that the first part of it has no application in the face of the evidence.

Mr. Felzer: Even the second sentence reaches a conclusion of concealment of the tax liability which is contrary to the evidence offered.

The Court: Well, I will not give it because it is not pertinent, and it is covered by other instructions. Number 20.

Mr. Felzer: 20 is repetitious.

The Court: I think so. And 21 may be repetitious. I am not sure.

Mr. Hoddick: I think more appropriately, forgetting the repetitious parts for a minute, yet if you find beyond a reasonable doubt that——

The Court: I am sure that is covered by my instructions.

Mr. Crumpacker: I don't recall any instruction with respect to this presumption of innocence.

The Court: Well, I am not certain just if that is a correct statement of the law. He is presumed to be innocent and that stays with him throughout the course of the trial until the proof establishes

guilt beyond a reasonable doubt. And [737] that is guilty. There isn't any presumption. Number 22. What is your authority for Number 22?

Mr. Crumpacker: The Foytich case, copied directly from that. That is true with respect to the last four instructions which are copied directly from the Foytich case.

Mr. Felzer: It is more in the nature of comments.

The Court: Were there other instructions covering the same subject matter? I am sure this is not applicable here. Do you object to Number 22, Mr. Felzer?

Mr. Felzer: Definitely, your Honor.

The Court: On what ground?

Mr. Felzer: On the ground that it is more in the nature of comments and conclusions rather than instructions as to the law.

The Court: It will be given over your objections. Now, although we are not through, how long do you gentlemen think it is going to take to present your arguments to the jury? Your opening argument will be how long?

Mr. Crumpacker: Oh, half hour to forty-five minutes, I guess.

Judge Hawkins: About half an hour, your Honor.

The Court: What I am trying to get at is whether we can get the case to the jury today. I dislike the idea of getting the case to the jury at 4:30 or 5:00 o'clock, particularly one that has taken

this long to try because of [738] the complexity of exhibits, the evidence and the number of counts.

Mr. Felzer: I feel that Judge Hawkins is underestimating the time.

Mr. Crumpacker: Well, of course, I expect to spend probably considerable time on rebuttal argument, too, your Honor, depending, of course——

Mr. Felzer: Even with that, there will be no time for the court to give its instructions because it will be a carry-over from the time of closing argument to the time of giving instructions.

The Court: We haven't settled the instructions, yet.

Judge Hawkins: The only difficulty, your Honor, is that I am putting KHON on the block at noon-time.

The Court: Oh, well, if we start at 9:00 o'clock tomorrow morning it will be given to the jury before that. Well, I will meet with you gentlemen at 2:00 o'clock. I didn't intend to take such a long noon hour myself, but I am not having lunch with some of the visiting senators and they don't happen out here very often. So we will continue settling instructions at 2:00 o'clock. (To the bailiff): When the jury returns, will you tell them that it may be another half hour, but to stand by. I propose to go ahead this afternoon after settling the instructions and we will get the opening argument of the Government. [739]

Mr. Hoddick: What I had in mind, your Honor, was that we would object to having the court take a break at the close of the reply argument of the

defendant and then have the Government come in with its closing argument in the morning.

The Court: I will try to be fair with you on that, because I don't know whether it makes any difference or not, but having defended on numerous occasions myself, I would prefer not to have the final say-so by the Government fall in the morning. But I will keep that in mind.

(Recess at 12:00 noon.) [740]

Afternoon Session

(Continuation of settling of instructions in chambers.)

The Court: First I apologize for being late. The senators were supposed to speak not more than five minutes. Now, let us go back to the ones we passed. First the Defendant's requested instructions. The first one is Number 14. Now, doesn't that go to the gist of the whole thing, that the Government must not only prove that the defendant did some act but that the Government has to prove all of the essential elements contained in each count of the indictment beyond a reasonable doubt, and those are the allegations contained in the indictment? And that goes as to each count. And then the question of wilfulness is covered by the general instructions to that effect.

Mr. Felzer: All we are suggesting at this point is that we omit just one clause, "in any manner to evade and defeat the tax." And let the rest of the

instruction stand as it is. And with that omission.

The Court: Well, why should the court single out any particular count or negative the proposition of proving all of the essential allegations? I think this is already covered by the instructions that I would give.

Mr. Felzer: Well, except that too many of them have the use of the word "wilfully" which we feel is the crux of the [741] act whether it is a misdemeanor or a felony. May we make this suggestion? May we suggest that we omit from an attempt, "from attempt" to the end of the word "indictment" and retain the rest of it?

The Court: What do you have to say to that, Mr. Crumpacker?

Mr. Crumpacker: I feel it is more or less a repetition. It seems to be a matter which is already covered in the court's previously settled instruction on the matter—actually in the general instruction, referring to the statute, or the instruction I think of the Plaintiff referring to the gist of the offense. It is covered by that. It is covered by that, namely, that you must prove all the elements, this and this and that, that they were done wilfully.

The Court: I am going to refuse it on the grounds that it is covered. Now we come down to Number 27. Is that the next one?

The Clerk: 27, your Honor.

The Court: 27. What is your objection to that, Mr. Crumpacker?

Mr. Crumpacker: It is a little bit misleading. And, of course, there is a law, a law which does

require it, so this is not correct either. But I think the court has a standard instruction with respect to a person not required to give incriminating statements, making incriminating statements which [742] would be more appropriate. I think that is what they are driving at. I don't know.

The Court: Well, this is not a correct statement of the law as I understand it to be.

Mr. Felzer: It is my understanding that there is in fact no code which requires one to answer to the questions of an Internal Revenue agent as such.

The Court: But there is a law which authorizes the issuance of subpoenas directing a taxpayer to give information. That is the very one you are relying on in your Number 28, a part of that law.

Mr. Hoddick: There are also some cases under that statute, your Honor, which say that a taxpayer even under subpoena does not have to produce documents or answer questions which would in any way incriminate him. At least it is no offense if he did so with that element present.

The Court: Well, the trouble is that the statute has not been invoked throughout the entire investigation.

Mr. Hoddick: It might be more to the point to modify this with an instruction that there is no law of the United States which under a circumstance, under the facts presented here, requires the taxpayer——

The Court: Well, that would mean in every criminal case the court has to negative the non-use of pertinent statutes.

Mr. Hoddick: Yes, but, of course, in this case an [743] issue has been definitely made of the defendant's non-co-operation with the agents.

The Court: That only goes to the question of his state of mind.

Mr. Hoddick: We would like the jury to know that being non-co-operative he was not in violation of any law or regulation.

The Court: I will refuse 27 and 28. Now, Number 30.

Mr. Felzer: With reference to Instruction Number 30, we would like to offer it with this revision, that failure of Mr. Abdul to furnish an agent of the Government with any books, records or any other information at any one particular time does not in and of itself constitute wilfulness.

The Court: That is the same subject matter of the lengthy instruction prepared by the Government which I refused to give because it points up these various things, including that failure.

Mr. Hoddick: Your Honor, might I advert to one point here? The Government has offered an instruction which we think correctly stated the law and which the court adopted, that if all of the necessary elements of the crime found to be as of the date when the tax return was due and the taxes payable, that the offense was complete as of that time. And we think that ties in right with this. That act of the taxpayer subsequent to the alleged completion of the crime or at the [744] time the crime would have been, which must have been found existing prior to that.

The Court: What do you have to say to that, Mr. Crumpacker?

Mr. Crumpacker: I don't think that is a correct statement of the law. All the evidence, regardless of whether it has to bear on the state of mind of the defendant, it is the events which occurred afterwards. I don't think there is any doubt about that.

The Court: I don't think there is either. Number 30 will be refused. I will refuse 31. It is covered by other instructions.

Mr. Hoddick: May I ask the court whether the instruction in the Forester case doesn't cover evil motive and that purpose?

The Court: Yes, it does. Now, Number 35. Here again I think we are duplicating.

Mr. Felzer: Well, duplication in itself isn't wrong, if the court please. And I feel that we must show some circumstance such as at least that portion which is included in the second sentence of this instruction, "If the Government's claim goes no further than to establish a state of facts from which the inference of untruthfulness or wilfulness may not be reasonably drawn, then the Government has failed to establish the charges beyond a reasonable doubt." This is something more [745] than just a question of wilfulness but also includes the burden of proof required, the amount of proof.

The Court: That will be given.

Mr. Felzer: That is specifically tied in with the element of the wilfulness, which is basic with reference to all twelve of the counts here, rather than just a general reasonable doubt instruction. In

other words, your Honor, at least the second portion of this or the second sentence of the instruction we feel should be given.

The Court: Well, I feel this way: The substance of 35 of the last sentence will be given in my overall instructions. Now, Number 37. I think that first sentence, two sentences of that are covered by other instructions. On that ground I will refuse it. Number 38, that also is covered. It will be refused.

The Clerk: Number 44 is the next.

The Court: 44. Well, that likewise is now covered on the question of wilfulness. The distinction is drawn between the various types of counts. That will be refused as covered.

The Clerk: Number 46.

The Court: And that also has now been covered. It will be refused on that ground.

Mr. Hoddick: That is the Fujimoto——

The Court: The Fujimoto instruction will have to be [746] changed. You recall that one, Mr. Hoddick?

Mr. Hoddick: I looked at it the other day when I prepared the one we submitted and deleted the portion which is not appropriate.

The Court: I think the rest of it is proper and I will give it so the jury will consider both sides and the effect that will be given to it.

Mr. Hoddick: For the record, your Honor, we will offer that instruction as given in the Fujimoto case with modification as appears, which is plural and the defendant is singular, as a substitute for our Number 49.

The Court: Yes, you withdrew that.

Mr. Felzer: Modified.

The Court: Does that take care of all of them?

Mr. Felzer: The defendant's instructions.

The Court: And the Plaintiff's?

Mr. Felzer: On Instruction 1 there was to be a revision of paragraph 2.

The Court: Yes, I will take care of that. I propose to read portions of the statute.

Mr. Hoddick: Your Honor, might I ask this: I don't know how numerous the instructions are, now that we have dwindled them down considerably. But if we could have advice from the court through the court's clerk as to the order in which these instructions would be given, it would facilitate our [747] following them at the time that they are given and would simplify the making of the necessary objections and avoid the shuffling of papers on counsel desk while you are going through them.

The Court: That is something that I hardly ever know until the last minute. And I can understand your difficulty. I will put it this way: I will try to let you know beforehand. But in any event your objections, the court's rulings, the court's rulings here in chambers, can be asserted in open court without the necessity of going through all of them. But you want to be able to check which ones I give?

Mr. Hoddick: And also in many instances you have advised that you will give them in substance, and if there is too much of a departure from substance we want to preserve the record with appropriate objections.

The Court: I will do my best to give you something beforehand, before I read them. Is there anything further in connection with instructions? We will take a five minute breather and then we will call the jury.

(The settling of instructions was completed at 2:40 p.m.) [748]

After Recess

(The trial resumed at 2:50 p.m. with jury present.)

The Court: The record will show that the jury is present, the defendant and his counsel. Sometimes the settling of instructions takes longer than might seem necessary to members of the jury, but it is a matter that has to be settled before argument commences. We are now ready to proceed and we will hear from Mr. Crumpacker on behalf of the Government.

(Mr. Crumpacker presented the opening argument on behalf of the plaintiff.)

The Court: Judge Hawkins, there are five minutes before the session normally adjourns. You are to make the argument now.

Judge Hawkins: Yes, your Honor.

The Court: The jury hasn't had an opportunity to hear your voice.

Judge Hawkins: Well, I will give them that pleasure tomorrow morning, your Honor.

The Court: Very well. Ladies and gentlemen of the jury, again before excusing you, as you now know, the evidence is all in and you have heard a part of the argument. And I could if I so desired keep you together as a body of twelve. [749] But I am certain that you will follow my instructions and I will not do it. Again before excusing you, you are instructed not to discuss this case with anyone, allow no one to discuss it with you, avoid reading or hearing anything about it and form no opinions about it. You will have a full opportunity for that tomorrow after you retire to the jury room to discuss it among yourselves. You are excused until nine o'clock tomorrow morning.

(Jury leaves courtroom at 3:57 p.m.)

The Court: This case will be continued until nine o'clock tomorrow morning. The court will stand adjourned until that time.

(The court adjourned.) [750]

December 5, 1956

(The trial resumed at 9:00 a.m.)

The Clerk: Criminal Number 11,072, United States of America, Plaintiff, versus Daniel L. Abdul, Defendant, for further trial.

Judge Hawkins: Ready for the defense, your Honor.

Mr. Crumpacker: Ready for the Government.

The Court: Very well, the record will show that

the jury is present, the defendant and his counsel.
Are you ready to present your argument?

Judge Hawkins: May I proceed, your Honor?

The Court: Yes.

(Judge Hawkins presented the argument on behalf of the defendant.)

(Mr. Crumpacker presented the closing argument on behalf of the plaintiff.)

The Court: Ladies and gentlemen of the jury, you will be excused for a short recess.

(Jury leaves the courtroom at 10.05 a.m.)

The Court: The court will take a recess.

(A recess was taken.) [751]

After Recess

The Court: The record will show the jury is present, the defendant and his counsel.

Ladies and gentlemen of the jury, this has been a rather lengthy trial. You have listened carefully to the evidence and to the arguments of counsel, and I am going to ask you to listen carefully to the instructions of law as I shall give them to you.

As I said before, it is your duty to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power but must be exercised with sincere judgment, sound discretion, and in accordance

with the laws, rules of law stated to you. The jury must accept the instructions of the court as comprising together a complete and correct statement of the law governing the case. You must not assume the existence of any law not stated in these instructions, nor speculate or guess as to what the law is. Regardless of any opinion you may now have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given to you in these instructions.

If during your deliberations doubt should arise in your minds concerning the law upon any given question, you [752] should so advise the court and the court will then again read the instructions covering the questions as to which you may be in doubt.

You are to decide this case simply upon the evidence that has been received by the court and the inferences that you may reasonably draw therefrom, and such assumptions as the law deduces therefrom as noted in my instructions, and in accordance with the law as I state it to you.

I told you at the very outset of this trial that the law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins a trial with a clean slate with no evidence against him, and the law permits nothing but legal evidence presented before the jury to be considered in support of the charge against the accused. So the presumption of innocence is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt

of the defendant's guilt from all of the evidence in the case.

In connection with counts one, three, five, seven, nine and eleven, you are instructed that it is unlawful for any person required to make a return as hereafter defined, to wilfully fail to make such return at the time or times required.

In connection with counts two, four and six you are instructed that the law provides as follows: Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter who wilfully fails to [753] collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter, or the payment thereof, shall in addition to other penalties provided by law be punished.

As to counts eight, ten and twelve, you are instructed that the law provides in part as follows: Any person required under this Title to collect, account for and pay over any tax imposed by this Title who wilfully fails to collect or truthfully account for and pay over such tax shall in addition to other penalties provided by law be punished.

The term "person" includes an officer or employee of a corporation who as such officer or employee is under a duty to perform the act in respect of which the violation occurs. Certain employers paying certain employees certain wages for certain employment are required to deduct and withhold a percentage of those wages for income tax purposes and to

collect from those wages as and when paid a certain percentage for Federal Insurance Contribution Act taxes. It is conceded by the parties that Home Furniture Company, Limited, was required to deduct, withhold and collect such taxes from the wages of its employees for their employment during the period of the indictment in question. These withholdings are required to be held in a special fund in trust for the United States. A return of Federal income taxes withheld from wages and Federal [754] Insurance Contribution Act taxes is required to be filed quarterly on Form 941 on or before the last day of the first month following the close of the quarter with the Director of Internal Revenue for the district in which is located the principal place of business of the employer. The taxes are due and payable without assessment at the time fixed for filing the return, although the mechanics of withholding may be performed by an agent, the responsibility rests with the employer. The return Form 941 must be signed and verified by the employer and in case of a corporation the president, vice-president or other principal officer.

The gist of the offenses charged in counts one, three, five, seven, nine and eleven of the indictment is wilful failure on the part of the defendant to file a return. To establish this charge the Government must prove, one, that the defendant was a person required by law to make a return for the quarters in question; two, that he failed to file and return for those quarters at the time required by law; and, three, that the failure to file such returns was wilful.

And the gist of the offenses charged in counts two, four, six, eight, ten and twelve of the indictment is wilfully attempting to evade the tax. To establish these charges the Government must prove, one, that the defendant was a person required by law to collect, account for and pay over the taxes for the quarters in question; two, that he deducted and collected [755] the taxes; and, three, that he wilfully failed to truthfully account for and pay over said taxes to the District Director with intent to defeat the tax or liability.

You will note that counts one, three, five, seven, nine and eleven charge the defendant with wilfully and knowingly failing to make quarterly returns to the District Director; and counts two, four, six, eight, ten and twelve charge the defendant with wilfully failing to truthfully account for and pay over to the Director the taxes for which such returns were required to be filed. The types of wilfulness involved in these two different charges are different, and I am going to ask you to pay particular attention to the instructions which I will now read to you with regard to the definition of "wilfulness."

With respect to the even counts, I instruct you as follows, that is, as to two, four, six, eight, ten and twelve, that in every crime there must exist a union of joint operation of acts or omissions or failures to act and intent. The burden is always upon the prosecution to prove both act or failure to act and intent beyond a reasonable doubt. A person is held to intend all the natural and probable consequences of acts knowingly done or omitted.

That is to say, the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done or omitted. [756]

An Act is done or omitted knowingly if done or omitted voluntarily and purposely and not because of mistake or inadvertence or other innocent reason. An act is done wilfully if done voluntarily and purposely and with specific intent to do that which the law forbids. An omission to act is done wilfully if done voluntarily and purposely and with the specific intent to fail to do that which the law requires to be done. A person who knowingly does an act which the law forbids or who knowingly fails to do an act which the law requires, purposely intending to violate the law, acts with specific intent.

It is not necessary for the prosecution to prove knowledge by the accused that a particular act or failure to act is a violation of law. Everyone is held to know what the law forbids and what the law requires to be done. Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to the intent, the jury is entitled to consider any statements made and acts

done or omitted by the accused and all facts and circumstances and evidence which may aid determination of the state of mind. [757] Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done. Personal advancement and financial gain are two well recognized motives for much of human conduct. These laudable motives may prompt one person to volunteer acts of good, another to volunteer acts of crime. Good motive alone is never a defense where the act done is a crime. If a person intentionally does an act which the law denounces as a crime, motive is immaterial except insofar as evidence of motive may aid determination of the issue as to intent.

Now, as to the other counts of the indictment, one, three, five, seven, eight and eleven, generally speaking, what I have just read to you is applicable with this limitation on the definition of the word "wilful" in failing to make a tax return. In that connection it means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard of whether one has a right so to act.

With these two standards in mind I further instruct you that the question of intent is a matter for you as jurors to determine. And as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way that you have at arriving at the intent of the defendant in

this case is for you to take into consideration all of [758] the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of the defendant was at the time in question.

The wilful failure to file a return and the wilful failure to truthfully account for and pay over taxes withheld are charged as separate offenses for each quarter. And if proven to your satisfaction beyond a reasonable doubt, each is a separate and distinct offense. If all the requisite elements of the crime have been proven to your satisfaction beyond a reasonable doubt, including wilfulness as I have defined it to you, the crime is complete at the time the return is required to be filed or the tax is required to be truthfully accounted for and paid over. However, in determining the elements of intent involved in each count, you may consider all of the evidence in the case. Every employer required to withhold and pay income taxes and every employer liable for Federal Insurance Contribution Act taxes, is required to keep detailed and accurate payroll records at a convenient and safe location accessible to Internal Revenue officers, and open for inspection at all times by such officers.

I further instruct you that the penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The fact that the civil sanctions may have been assessed in this case has no bearing one way or the other on your determination of the guilt or innocence of the defendant [759] in this criminal case.

The evidence in this case consists of sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions.

An inference is a deduction or conclusion which reason and common sense leave the jury to draw from facts which have been proved. A presumption is an inference which the law requires the jury to make from particular facts in the absence of convincing evidence to the contrary.

A stipulation by and between counsel for the parties as to any facts is binding upon you and those facts shall be determined by you as true in all respects, and you are to rely thereon and are bound thereby insofar as those particular facts are concerned.

I further instruct you that all evidence relating to any admission or incriminatory statements claimed to have been made by a defendant outside of court should be considered with caution and weighed with great care.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence such as the testimony of an eye witness. The other is circumstantial evidence. The proof of a chain of circumstance pointing to the commission of the offense. As a general rule the law makes no distinction between direct and circumstantial [760] evidence but simply requires that before convicting a defendant the jury be satisfied of the defendant's guilt beyond a reasonable

doubt from all of the evidence in the case. In order to justify a verdict of guilt based in whole or in part upon circumstantial evidence, the facts in the chain of circumstance shown by the evidence must be consistent with the guilt of the accused and inconsistent with every reasonable supposition of innocence. If the facts and circumstances shown by the evidence are as consistent with innocence as with guilt, the jury should acquit the accused.

During the course of this trial I on occasion asked questions of a witness in order to bring out facts not then fully covered by the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you as jurors are at liberty to disregard all comments of the court or counsel in arriving at your own findings as to the facts.

During the course of a trial it is the duty of lawyers on each side to make objections when the other side offers evidence which counsel believes is not admissible under the rules of evidence. It is the duty of the court to decide whether under the rules of evidence testimony or other evidence may be received. Whenever the court has sustained an objection to a question, you are to disregard that question and may draw no inference from the wording of it or speculate as to what the [761] witness would have said if permitted to answer. Nor may you assume any party has objected to a question because that side expected the answer if given to be unfavorable.

During the trial of this case the court has per-

mitted certain evidence to be introduced over the objection of counsel. In so ruling the court has not determined or indicated any opinion as to the weight or effect of such evidence.

In judging the credibility of witnesses and the weight and effect of evidence, you are not to consider the rulings or comments of the court in admitting or rejecting evidence.

I further instruct you that all evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused should be considered with caution and weighed with great care. And when from a given transaction or a series of transactions different reasonable inferences may be drawn, some favorable and some unfavorable to the accused person, it is the duty of the jury to adopt the inference favorable to the accused.

The defendant here is to be tried only on the evidence which is before the jury and not upon suspicions that may have been elicited by questions of counsel, or answers which were not permitted.

I further instruct you that whenever a defendant seeks to prove affirmatively any fact in his favor, it is only necessary for such defendant to prove facts which raise a reasonable [762] doubt in your minds, expecting the ultimate facts sought to be proved. If the defendant creates in your mind a reasonable doubt respecting any fact which he attempts to prove, it is your duty to find that fact in such defendant's favor.

You will note that the burden of proof with re-

spect to the prosecution and the degree to which the prosecution must prove a fact is essentially different from that required of the defendant.

You are instructed that if from the evidence you find that the defendant did not file tax returns at the time or times required by law or that he did not pay the tax required by law, such failures in themselves do not constitute wilfulness under the law. Unless you find that the filing and paying late of such taxes were acts with a bad purpose or an evil motive. If the Government proof goes no further than to establish a state of facts for which the inference of untruthfulness or wilfulness may not be reasonably drawn, then the Government has failed to establish the charges beyond a reasonable doubt. And under such circumstance it would be the duty of the jury to acquit the defendant.

You are further instructed that when the belief of a person charged with wilful failure to pay and file returns on time with an intent to evade or defeat the tax, the motive of his act is material and he may not only directly testify that he had no intent to evade or defeat any tax imposed but he may [763] buttress the statement with testimony of relevant circumstances, including conversations had with third parties or statements made by them tending to support his statement that he had no intent to evade or defeat any tax imposed.

You are instructed that the general rule is that the testimony of a witness cannot be wholly disregarded unless it is impeached or contradicted by other testimony or by some presumption or by an

inference deducible from the facts proved, or unless it is inherently improbable.

These may sound repetitious but I will give them anyway. If I, as the judge of this court, have at any time during this trial used any language which or seemed to you to indicate the opinion of the judge as to any question of fact or as to the credibility of any witness, you must not be influenced thereby, but you must determine yourselves all questions of fact without regard to the opinion of anyone else.

And if in stating to you any proposition of law I have assumed any fact as proven, you are to disregard such an assumption and deduce your own conclusions from the evidence.

I want you to distinctly understand that in this charge the court is in no manner or form expressing or desires to express any opinion upon the weight of the evidence or any part thereof, nor does the court express any opinion as to the truth or falsity of the testimony of any witness, nor does the court in any manner or form express its opinion that any alleged [764] fact in this case is or is not proven. With questions of fact, the weight of the evidence, the credit which you should give to any witness sworn in the case, the court, therefore, expresses no opinion.

You are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony. A witness is presumed to speak the truth. This presumption, however, may be repealed by the manner in which he testifies, by the character of his testimony, or by evidence affecting his

reputation for truth, honesty and integrity or his motives or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness or may disbelieve the whole or any part of it as may be dictated by your judgment as reasonable persons.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the plaintiff or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

A witness may be impeached by evidence that at other [765] times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced

that he or she has in other particulars sworn to the truth.

You are instructed that it is the right and privilege of a defendant either to take the witness stand and testify, or to remain silent and not appear as a witness. When a defendant has become a witness and has testified, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness.

As I pointed out to you at the beginning of this trial, the burden is upon the prosecution to prove a defendant guilty beyond a reasonable doubt of every essential element of the crime charged. The law does not impose upon a defendant the duty of producing any evidence. A reasonable doubt may arise not only from the evidence produced but also from lack of evidence. A reasonable doubt, ladies and gentlemen, is just [766] such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly disagreeable duty. It must be a substantial doubt such as an honest, sensible, fair-minded man might, with reason, entertain consistently with a conscientious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a man of ordinary prudence, sensibility and decision, in determining an issue of great concern to himself, to pause or hesitate in arriving at his conclusion. It is a doubt which is created by the want of evidence or maybe by the evidence

itself. It is not, however, a speculative, imaginary or conjectural doubt.

It is not incumbent upon the Government in the trial of a criminal case to prove the defendant guilty beyond all possibility of doubt because that would be impossible. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

I further instruct you that prior investigation to determine civil liability in order that the Government may assess and collect the taxes before the collection is jeopardized in any way does not preclude the Government from instituting further investigation and ultimately bringing criminal charges in connection with the same tax delinquencies.

The importance of your duties as jurors requires that [767] you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this district that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books.

I am now going to instruct you on the question of your treatment of the so-called character or reputation evidence. Evidence of good character is regarded by the law as relevant to the question whether a defendant is innocent or guilty of the crime charged because the jury may, if its judgment so directs, reason that it is improbable that a person of good character in such respects would have conducted himself as alleged. Evidence of

good character may be sufficient to raise a reasonable doubt whether or not the defendant is guilty, which doubt otherwise would not exist.

At the beginning of a criminal case, the character of an accused is not presumed to be either good or bad. The character of a defendant cannot become a subject of testimony by Government witnesses until a defendant has placed his character in issue by offering evidence of his good character as part of his defense. Therefore, the Government is entitled to offer evidence of bad character, to rebut the testimony offered by the defendant as to his good character.

In weighing the testimony of witnesses called by the [768] defense and the prosecution as to the reputation of the defendant, you are to consider primarily, on the issue of reputation, the general reputation in the community. It is for you to decide the weight to be given to the testimony of the various character witnesses. You may, if you see fit, reject the testimony of any witness who in your judgment has not had an adequate opportunity for knowing the reputation of the defendant's character. Testimony of reputation for good character may be based upon the fact that a witness has not heard the defendant's character questioned. Testimony of reputation for bad character, on the other hand, must be based on affirmative knowledge.

As I have said, evidence of good character may be sufficient to raise a reasonable doubt as to whether or not a defendant is guilty, which doubt otherwise would not exist. Evidence of bad character as to a

defendant may be considered by you to rebut the testimony offered by such defendant as to his good character. Such evidence as to bad character does not relieve the prosecution of its burden of proving beyond a reasonable doubt by affirmative evidence each and every essential element of the offense charged.

However, if, after weighing all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty of the crimes charged against him in the indictment, your duty will be to find him guilty, notwithstanding the testimony that he was a person of good character. [769]

You are to remember throughout your deliberations that the defendant is entitled to the individual judgment of each juror. The verdict must represent the considered judgment of each one of you. In order to return a verdict, it is necessary that each juror agree thereto as to each count in the indictment. Your verdict as to each count must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of

your fellow jurors, or for the mere purpose of returning a verdict.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when shown it is incorrect. You are [770] not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction.

Bear in mind at all times that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

If the accused be proved guilty, say so. If not proved guilty, say so. Remember at all times that a defendant is entitled to acquittal if any reasonable doubt remains in your minds.

Remember also the question before you can never be, will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

When you retire to your jury room to deliberate, you will select one of your number as foreman who will represent [771] you as your spokesman in the future conduct of this case in this court. If it becomes necessary during your deliberations to communicate with the court, do not indicate in any manner how the jury stands numerically or otherwise. When you have agreed upon your verdict, the same will be signed by your foreman and you will return such verdict into the court. A form of verdict has been prepared and may be taken with you. There are, as I have explained, twelve counts, and as to each count the foreman will write in the verdict of the jury the words either guilty or not guilty as to each count. You may also take to the jury room with you a copy of the original indictment in this case and all of the exhibits which have been received in evidence. From this time until further order of the court, it is necessary that you remain together in a body. Bailiffs will be sworn to attend you and you will not communicate with anyone except with the court through the bailiffs until further order of the court.

Mr. Hoddick, are there any objections as to the instructions given by the court other than those noted in chambers yesterday?

Mr. Hoddick: Yes, your Honor, there are and

probably we would like to have the opportunity to present them.

The Court: Will this take very long?

Mr. Hoddick: No, your Honor.

The Court: Ladies and gentlemen of the jury, will [772] you all just stand out in the corridor and gather in a body for just a few minutes with the bailiff.

(Jury leaves courtroom at 11:15 a.m.)

The Court: Will you state which instructions?

Mr. Hoddick: May it please the court, so there won't be any question of compliance with the rule, may I simply note the numbers of the instructions which were either refused and to which we objected to the refusal, or given and we objected to the giving? The defendant objects to the refusal of the court to give Instruction Numbers 1 through 12, Numbers 14, 15. These are Defendant's suggested instructions. One through twelve, fourteen, fifteen, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, to the modification of Number 35, the refusal to give 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 49 and 54. And to the giving of Plaintiff's Instruction Number 7 as modified by the court, Numbers 11, 18 and 22, on the grounds that they are contrary to the law applicable and principally in tax cases.

Your Honor, on Instruction Number 7 of the Plaintiff, we object to the modification. First we object to the instruction as submitted and we object to the modification as given by the court on the grounds that the court gave the general instruction

on the subject of intent which is applicable to criminal cases generally such as larcenies, or assault and battery. If a person intends the natural and probable consequence [773] of his acts, and that is the criminal intent involved. We submit that in tax cases the intent necessarily must have the evil purpose, bad purpose and evil motive. The court did not give the language from the Forester case emphasizing the evil purpose and the bad motive which must exist in the intent of a tax case. It is not simply a knowing violation of the law. We would further point out that——

The Court: Just one moment on that, Mr. Hoddick. Do you have a copy of your instructions on wilfulness? Mine is in my chambers. Or if you have the Forester case—oh, you returned that to me?

Mr. Hoddick: Yes, I did, your Honor. The point we make is the distinction between standard criminal cases——

The Court: Well, I propose to rectify that and I will do so.

Mr. Hoddick: One of the instructions on that score was the defendant's proposed Instruction Number 1. (Handing the document to the court.)

The Court: Well, now in other words, the omission of the bad faith and evil motive in the definition of wilfulness, that is what you primarily have in mind?

Mr. Hoddick: Your Honor, it goes a little bit further than that. In your giving of the modified instruction on wilfulness in connection with the felony counts, you specifically instructed the jury

that motive played no part, and then [774] later on in giving Defendant's Instruction Number 39 you told them that motive was something for them to consider. We submit, of course, that motive in a tax case is a basic ingredient that they should consider, so we object to its exclusion from the instruction given by the court on wilfulness.

The Court: Wait a minute. I said motive is immaterial except as evidence of motive may aid determination of the issue as to intent, which I think is correct.

Mr. Hoddick: Well, we interpret the Forester case as requiring a showing of evil motive and also in mind the Spies case.

The Court: Well, I will take care of that oversight, including the bad faith and evil motive, by supplementing the instructions and reading the following and listening carefully from the Forester case, and this will apply to the even counts:

"An act is done wilfully if done voluntarily and purposely and with a specific intent to do that which the law forbids. Wilfulness implies bad faith and an evil motive."

Mr. Hoddick: Your Honor, may the record be clear that this is an instruction which should, we feel, also be given as to the definition of wilfulness in connection with odd counts.

The Court: Yes, that will so show.

Mr. Hoddick: Also, your Honor, we want to note our objection to the court's failure to give Defendant's Requested [775] Instruction Number 25 which we had understood was going to be given.

The Court: May I see your copy? (Document handed to the court.) I think I did give that in substance. This is not what you would call an income tax violation case, is it?

Mr. Hoddick: Well, it is a tax violation case. I followed each of the instructions that had been submitted at the time the court read them, and the point, of course, in that is that in the tax case they are not supposed to have any doubts. That is the Forester case decision.

The Court: Well, I don't know that Judge Chambers went into the definition of reasonable doubt. Is there any objection to the definition of reasonable doubt as given?

Mr. Hoddick: Well, we think in the light of the Forester decision the burden is still heavier in a tax matter.

The Court: Well, when I said I was going to give this in substance, I think that I did. But you may for the record have your objection to my refusal to give it.

Mr. Hoddick: In the form in which it is submitted.

The Court: Yes. Now, so that there may be no question, is there anything that you want to add?

Mr. Hoddick: May I have just a moment?

The Court: Yes.

Mr. Crumpacker: Your Honor, on that subject, I would suggest or ask that both definitions be read again so [776] there wouldn't be any unbalance in the thing and also I noted that by inadvertence

apparently the court misread when reading that instruction, one of the counts. It is only a technical error but just to clear that up so there won't be any confusion, in reading the definition of wilful as to the odd counts, as I recall the court stated counts one, three, five, eight, nine and ten and eleven. I think it was just an inadvertence. But at least for the record probably the court should clear it up. I don't think it confused them at all. But perhaps as long as the court is reinstructing on others——

The Court: I am not worried about that. It was an oversight because I think the jury understands by this time the different types of offenses. Does that take care of it, Mr. Hoddick?

Mr. Hoddick: Yes, your Honor.

(Jury recalled to the courtroom at 11:28 a.m.)

The Court: Ladies and gentlemen of the jury, counsel for the defendant have called to my attention an oversight in my instructions concerning the definition of wilfulness or doing something wilfully which, as you know by now, is a very important element in this case. So I am going to supplement my instructions in this manner and perhaps it will clarify it for you. And this is a supplemental instruction. In other words, an addition, except for this repetition. The word [777] "wilful" as used in counts 1, 3, 5, 7, 9, and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to

act. With regard to the other counts, 2, 4, 6, 8, 10 and 12, I supplement my instructions on the definition of wilful in the following language: An act is done wilfully if done voluntarily and purposely and with a specific intent to do that which the law forbids. Wilfulness implies a bad faith and an evil motive. Does that cover it, Mr. Hoddick?

Mr. Hoddick: As to that instruction?

The Court: Yes.

Mr. Hoddick: Yes.

The Court: Mr. Clerk, will you swear the bailiffs?

(Bailiffs sworn in to take charge of jury.)

The Court: The jury will retire to the jury room to conduct its deliberations, and the form of the verdict and the indictment and the exhibits will be brought up to you.

(Jury leaves courtroom for its deliberations at 11:32 a.m.)

The Court: I don't know whether counsel for the defense in this case are like Mr. Soares or not but every time I tell him that if he wishes to leave the court house he may do so so long as he is available in a short time, and his response always is that I will stay here until the verdict is [778] returned. But if you wish to go to your offices, and we have your telephone numbers, just so that you are available in a short time, you may do so.

Mr. Hoddick: Thank you, your Honor. And so that the record will be clear, your Honor, may it

reflect that our acceptance of the court's modification of Plaintiff's Instruction Number 7 as to the definition of wilfulness in connection with felony counts does not constitute a waiver on our part of the specific instruction we submitted on wilfulness.

The Court: Yes, the record will so show. The court will stand at recess awaiting the verdict of the jury.

(The court recessed.)

(The court convened with the jury present at 2:33 p.m.)

The Court: The record will show the jury is present, the defendant and his counsel. Mr. Zane, I have a message from you in which you state, "May we have a copy of your instructions or examination. If not, will you please read your instructions to us once more."

Unfortunately I have made notations and deletions on the instructions, on some of them that I read to you, and would prefer not to give you anything but a clean copy of the entire instructions. I am wondering if you are desirous of having the entire instructions read again or were there certain portions that you discussed during your deliberations?

Mr. Zane: Your Honor, certain members of the jury [779] are confused. They would like the words "intent" and "motive" discussed.

The Court: I thought that perhaps was your problem, and you may be seated, Mr. Zane. And as a result of that I called in counsel for the parties

and we have gone over it and we have tried to present that problem to you in a clearer fashion. Was there any discussion or question raised about burden of proof, presumption of innocence, credibility of witnesses, how you are to treat the evidence and that sort of thing?

Mr. Zane: No.

The Court: Primarily on the question of what is wilfulness?

Mr. Zane That's right.

The Court: As used in this case. I think, then, this instruction will answer your inquiry. I will read it and see if it does.

You will note that counts 1, 3, 5, 7, 9 and 11 charge the defendant with wilfully and knowingly failing to make quarterly Federal tax returns to the District Director; and counts 2, 4, 6, 8, 10 and 12 charge the defendant with wilfully failing to truthfully account for and pay over to the Director the taxes when such returns were required to be filed. The types of wilfulness involved in these two different charges are separate and distinct and I ask you to pay particular attention to me when I describe to you just what is meant in each instance. [780] Now we are getting down to what you had in mind?

Mr. Zane: Yes.

The Court: The word "wilful" as used in counts 1, 3, 5, 7, 9 and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless

disregard whether one has the right so to act. The word "wilful" as used in counts 2, 4, 6, 8, 10 and 12, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, with respect to these counts, wilfulness implies bad faith and an evil motive.

Mr. Zane: One of the members expressed a desire to have a copy of that.

The Court: I am reluctant, Mr. Zane, to give to the jury only one instruction because, as I advised you, the instructions must be considered in their entirety and you should not single out any particular instruction. However, I can see your problem here, because of the different definitions of "wilfulness" as to the different counts.

Do counsel for either side have any objection to the court furnishing the jury under the circumstance a clean copy of this instruction?

Mr. Hoddick: May it please the court, for the defendant [781] our basic position is that if the jury is going to have the instruction it should have all the instructions. And in this connection with this particular instruction, they should also have our requested instruction Number 35.

The Court: Well, there is the problem we get into, ladies and gentlemen. And it is perfectly proper. Mr. Hoddick is not trying to hold back anything from you nor is the Government nor am I. Supposing I read that to you once again. I will read it carefully and slowly and then you go back to your

jury room. If you want me to read it again, I will do so late in the day. And I will start with this portion of it. The types of wilfulness involved in these two different charges are separate and distinct and I ask you to pay particular attention to me when I describe to you what is meant in each instance. The word "wilful" as used in counts 1, 3, 5, 7, 9 and 11, that is, in failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful, or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act.

The word "wilful" as used in the remaining counts, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct.

Further, with respect to these counts, wilfulness implies [782] bad faith and an evil motive.

Is there anything further you desire to have at this time?

Mr. Zane: That's all, your Honor.

The Court: Very well. You may retire to your jury room.

(Jury leaves courtroom at 2:45 p.m.)

Mr. Hoddick: Your Honor, for the record we object to the giving of the last instruction to the jury insofar as it differentiated between what constituted motives in misdemeanor situations and in felony situations. And we request that that differen-

tiation having been accentuated by this instruction standing alone, that the court should also give to the jury Defendant's Instruction Number 35 which was heretofore given as a companion instruction.

The Court: I am not satisfied that it is necessary under the circumstance, Mr. Hoddick. Your objection will be noted for the record. The court will stand at recess awaiting further word from the jury.

(The court recessed.)

(The court reconvened at 8:50 p.m. with the the jury present.)

The Court: The record will show the jury is present, the defendant and his counsel. Mr. Zane, I have a message from you, that a few members of the jury would like to have you read over the instructions again as to the word "wilful" [783] pertaining to counts 2, 4, 6, 8, 10 and 12. Is that correct?

Mr. Zane: That's correct.

The Court: And I will comply with your request. The word "wilful" as used in counts 2, 4, 6, 8, 10 and 12, that is, in failing to truthfully account for and pay over the taxes means with knowledge of one's obligations to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, with respect to these counts, wilfulness implies bad faith and an evil motive. Shall I read it again?

A Juror: Once more.

The Court: Very well. The word "wilful" as

used in counts 2, 4, 6, 8, 10 and 12, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligations to pay the taxes due and with intent to defraud the Government by any affirmative conduct. Further, with respect to these counts, wilfulness implies bad faith and an evil motive. Very well. You may return to the jury room.

(Jury leaves courtroom at 8:53 p.m.)

Mr. Hoddick: Your Honor, may the record again reflect the defendant's objection to the differentiation emphatically drawn to the juror's attention by giving this instruction solely with reference to the even numbered counts. And also we note an objection, we feel the instruction is incomplete in the failure of the court to also give [784] Defendant's Requested Instruction Number 35 along with it.

The Court: Yes, the record will so show. The Court will stand at recess.

(The court recessed.)

(The court reconvened with the jury present at 9:18 p.m.)

The Court: The record will show the jury is present, the defendant and his counsel. Mr. Zane, I have word through the bailiff that the jury have reached a verdict.

Mr. Zane: That's correct, your Honor.

The Court: Will you please hand the verdict to the clerk. (Foreman hands verdict to the clerk and

same is handed to the court.) Mr. Clerk will you read the verdict?

The Clerk: United States of America, Plaintiff, versus Daniel L. Abdul, Defendant. Verdict. We, the jury, duly impaneled and sworn, in the above-entitled cause, do hereby find the defendant Daniel L. Abdul as to count 1, guilty; as to count 2, not guilty; as to count 3, guilty; as to count 4, not guilty; as to count 5, guilty; as to count 6, not guilty; as to count 7, guilty; as to count 8, not guilty; as to count 9, guilty, as to count 10, not guilty; as to count 11, guilty; as to count 12, not guilty; as charged in the indictment herein. Dated Honolulu, T. H., this 5th day of December, 1956. Signed James C. Zane, foreman.

The Court: The verdict will be received and filed. Ladies and gentlemen of the jury, you have deliberated a long [785] period of time on the evidence and the law in this case, and it has not been an easy task on your part. The complexity of the evidence and the law involved required deliberation and I am grateful to each and every one of you for the time that you have spent on it. I think that your verdict represents the result of careful deliberation. Do you have another jury trial set, Mr. Clerk?

The Clerk: Not until the first of the year, your Honor.

The Court: Very well. For the eleven of you who have never served on a jury before, I am certain that it has been an interesting experience and I hope that you will be back again soon to sit in a similiar capacity. I do not believe that we have any jury trials set between now and the 1st of January.

The Clerk: It is on the 7th.

The Court: The 7th, which will be next year. So in addition to thanking you for your services in this case, I am going to take this opportunity although it is a bit early, to wish you all a very Merry Christmas and a Happy New Year, and you are excused subject to call by the clerk of the court.

(Jury leaves courtroom at 9:23 p.m.)

The Court: The defendant will be referred to the Probation Office for a pre-sentence investigation and report, and the matter of sentence will be set down after the court has received that report. [786]

Mr. Hoddick: Your Honor, it does not require in a Federal court under the present rule that the defendant does note an exception but the defendant does note an exception that the verdict is contrary to the law and the evidence and at this time renews the motion made at the close of the Government's case and which was again renewed at the close of the case for a judgment of acquittal by the court as to the counts on which the jury has returned a verdict of guilty. It would be my understanding that the court or it has been my understanding that the court has reserved ruling on that motion.

The Court: Yes. That is correct. And I think that the facts and the law are clear enough, Mr. Hoddick, so it will not require additional argument on that motion, and the motion will be denied. The court will adjourn until nine o'clock tomorrow morning.

(The court adjourned at 9:23 p.m.) [787]

We, Albert Grain and Elbert Cripps, Official Court Reporters, do hereby certify as follows: That we reported Criminal Case Number 11,072, United States of America, Plaintiff, versus Daniel L. Abdul, Defendant, a case in the United States District Court for the District of Hawaii, commencing on November 26, 1956, and continuing through December 5, 1956; that the foregoing transcript of said proceedings is true and correct.

April 9, 1957.

/s/ ALBERT GRAIN.

April 9, 1957.

/s/ ELBERT CRIPPS.

[Endorsed]: Filed April 10, 1957. [788]

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Aug. 16—Indictment filed.

Aug. 16—Entering order to issue summons returnable Aug. 20, 1956 at 10 a.m.

Aug. 17—Summons issued with copy for service.

Aug. 17—Marshal's returns filed (served).

Aug. 20—Entering proceedings at arraignment, waived. Continued to Sept. 10, 1956, at 8:45 a.m. for plea or to file motions, etc. Assigned to Judge Jon Wiig for fur-

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ther proceedings by Judge J. Frank McLaughlin.

Sept. 7—Motion for inspection of Documents, Affidavit, Memorandum of Points and Authorities in Support of Motion for Inspection of Documents and Notice of Motion filed.

Sept. 14—Entering proceedings at hearing on motion and for plea. Court advised that copies have been supplied and government has no objections to inspection, etc.

Sept. 14—Requests continuance for plea. Continued to Sept. 21, 1956, at 10 a.m. for plea.

Sept. 21—Entering proceedings at plea. Plea Not Guilty entered to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 & 12.

Sept. 21—Set for trial November 26, 1956, at 10 a.m.

Nov. 21—5 blank subpoenas with copies issued to U. S. Attorney.

Nov. 26—Marshal's returns to subpoenas filed (served).

Nov. 26—Defendant's Suggested Questions for Voir Dire Examinations submitted to Court.

Nov. 26—Entering proceedings at Trial. Jury empaneled and Sworn. Opening statement by Crumpacker. Defense statement reserved. Witness: (Plaintiff) James Williams, Howard H. K. Mew. Exh. (Plaintiff) Nos. 1 to 21, incl., marked for ident. 4 p.m. Adjourned to 9 a.m. November 27,

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1956, for further trial—Jurors admonished.

Nov. 27—Entering proceedings at further trial—Jurors, Defendant and Counsel present—Witnesses: (Plaintiff) Howard H. K. Mew, Susan Spidell, Katsuyoshi Watanabe—Exhibits (Plaint.) Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 & 14 Admitted—4 p.m. Adjourned to 9 a.m. November 28, 1956—Jurors Admonished.

Nov. 28—Entering proceedings at further trial—Jurors, Defendant and Counsel present—Witnesses: (Plaint.) Katsuyoshi Watanabe, Janet Yamamoto and Marion Burns—Exhibits (Plaint.) No. 13 admitted—12:01 p.m. adjourned to 9 a.m. November 29, 1956, for further trial—Jurors Admonished.

Nov. 29—Entering proceedings at further trial—Jurors, Defendant and Counsel present—Witnesses: Jimmy Walker (Motion for entry mistrial—denied), George D. Stratton, Caroline Moyer, Kunishi Murata, Clarence K. Karimoto, Raymond A. Fielin (Plaint.) Exhibits: (Plaint.) 15, 16, 17, 18, 19, 21, 22, & 23 admitted No. 24 for Ident. (Deft.) A, B-1 to 15, incl., C, D, E, F, & G—Admitted—4 p.m. Adjourned to 9 a.m. November 30, 1956—Jurors Admonished.

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Nov. 29—1 blank subpoena issued with copy (Defense).

Nov. 29—2 blank subpoenas issued with copy (Plaintiff).

Nov. 30—Entering proceedings at further trial—Jurors, defendant and Counsel present—Witnesses: (Plaint.) Raymond A. Fiellin—Exhibits: (Plaint.) No. 28 admitted—10:14 a.m. Plaintiff Rests—Motion for judgment of acquittal—Jurors withdrawn—Argument by Felzer and Crumpacker—Ruling reserved—Jurors returned—Defense Statement by Hoddick—Witnesses: (Defense) Catherine Y. Abdul, Daniel L. Abdul, George Vernon Tharp, Francis Wilder Wight, Thomas L. Crosby—Exhibits: (Deft.) H, for Ident. 4:04 p.m. Adjourned to December 3, 1956, at 9 a.m. for further trial—Jurors admonished.

Nov. 30—Marshal's returns to subpoenas filed; served.

Dec. 3—5 blank subpoenas with copies issued (Plaint.)

Dec. 3—Entering proceedings at further trial—Jurors, Defendant and Counsel present—Witnesses: (Defense) Daniel L. Abdul—Exhibits: (Plaint.) No. 24 admitted—No. 29 Ident. (Deft.) H admitted; 3:25 p.m. Defense Rests—Discussions by

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Court and counsel—3:39 Adjourned to 9 a.m. December 4, 1956, for further trial Jurors admonished. Marshal's returns to subpoenas filed (served).

Dec. 4—Entering proceedings at further trial—Jurors, Defendant and Counsel present—Witnesses: (Rebuttal) George D. Stratton, Samuel Landau, Mildred Sawtelle, Thomas C. Major—9:45 a.m., Both Sides rest—Defense requests ruling on motion for judgment of acquittal—Ruling reserved—Motion by Felzer to dismiss Counts 2, 4, 6, 8, & 10—denied—9:48 a.m., Jurors admonished and excused to 11 a.m. and further excused to 2 p.m.—Settlement of Instructions (in chambers—Court and Counsel). Defense submits 54 requested and Plaintiff 22—2:50 p.m. Jurors, Defendant and Counsel present—Opening argument by Crumpacker, 3:55 p.m. Adjourned to 9 a.m. December 5, 1956, for further trial—Jurors admonished.

Dec. 5—Entering Proceedings at further trial—Jurors, Defendant and Counsel present—Defense Argument by Hawkins—9:40 a.m. Closing argument by Crumpacker—10:30 a.m. Court's Instructions to Jury. 11:15 a.m. Jurors withdrawn for exceptions, etc.—Exceptions by Hoddick—

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11:27 a.m. Jurors returned—Court's further instructions—Titcomb and Osmers sworn and Case to Jury—2:30 p.m. Jurors returned and further instructed—2:45 p.m. Returned to Petit Jury Room to further deliberate—Objections by Hoddick to Court's instructions, etc.—8:50 p.m. Jurors returned and further instructed—8:53 p.m. Jurors returned to Petit Jury Room to further deliberate—Exceptions by Hoddick—9:19 p.m. Jurors, Defendant and Counsel present—Verdict—Counts 1, 3, 5, 7, 9, 11 Guilty; Counts 2, 4, 6, 8, 10 & 12 Not Guilty. To report to Probation office for investigation and report—Sentence to be scheduled after receipt of report—Hoddick renews motion for Judgment of Acquittal and for Court's ruling—Motion denied.

Instructions filed:

Verdict filed: Counts 1, 3, 5, 7, 9 & 11 Guilty. Counts 2, 4, 6, 8, 10 & 12 Not Guilty—WIIG

Dec. 14—Motion for New Trial—Memorandum of Points and Authorities and Notice of Motion filed.

Dec. 27—Entering proceedings at hearing on Motion for new trial—Arguments by Felzer and Crumpacker—Motion for New Trial—denied—continued for sentence.

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Jan. 11—Entering proceedings at sentence—Count 1—Imp. 1 year; Count 5—Imp. 1 year; Count 9—Imp. 1 year; to run concurrently; to pay costs of prosecution. Count 3—Imp. 6 months; Count 7—Imp. 6 months; Count 11—Imp. 6 months; to run concurrently; Counts 3, 7 & 11 imprisonment to run consecutively with Counts 1, 5 & 9. Mittimus stayed to noon January 14, 1957, upon request of defense. Judgement and Commitment filed—WIIG.

Jan. 14—Notice of Appeal filed:

Entering proceedings (in chambers) on matter of supersedeas bond on appeal—Crumpacker recommends that bond be set at \$5,000.00—Bond set at \$5,000.00—Court will approve bond with Defendant and wife as sureties supported by real property owned by sureties. Form of Clerk's statement of docket entries under Rule IV airmailed to C.C.A. 9th Cir.

Jan. 14—Counsel advised by letter as to notice of appeal.

Jan. 14—Supersedeas Bond on Appeal filed.

Jan. 14—Appraisal Report filed.

Jan. 14—Copy of notice of lien filed.

Jan. 14—Reporter's transcript plea filed.

Jan. 22—Reporter's transcript sentence filed.

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Jan. 30—Plaintiff's Bill of Costs filed.

Feb. 21—Order extending time for filing record on appeal and designating appeal filed. McLaughlin.

April. 8—Designation of Record on Appeal filed (Deft.).

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 115, consists of a statement of the names and addresses of the attorneys of record and of the various original pleadings, exhibits, and transcript of proceedings as hereinbelow listed and indicated:

Indictment.

Defendant's Requested Instructions Nos.
1-54.Plaintiff's Requested Instructions, Nos. 1,
2, 3, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 18, and 22.

Court's Instructions Nos. 1, 2, and 3.

Communications between Court and Jury.

Verdict.

Motion for New Trial, Memorandum of Points and Authorities and Notice of Motion.

Judgment and Commitment.

Notice of Appeal.

Supersedeas Bond on Appeal.

Bill of Costs.

Order Extending Time for Filing Record on Appeal and Designating Appeal.

Designation of Record on Appeal.

Transcript of Proceedings.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, and 28.

Defendant's Exhibits "A," "B-1," to "B-15," inclusive, "C," "D," "E," "F," "G," and "H."

I further certify that included in said record on appeal is a copy of the Docket Entries. 110-112

In witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of April, 1957.

[Seal /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing supplemental record on appeal in the above-entitled cause, numbered from Page 1 to Page 5 consist of the following:

Plaintiff's Requested Instruction No. 8.

Plaintiff's Requested Instruction No. 10.

Designation of Additional Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of April, 1957.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii.

[Endorsed]: No. 15523. United States Court of Appeals for the Ninth Circuit. Daniel L. Abdul, Appellant. vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed April 12, 1957.

Docketed: April 23, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15523

DANIEL L. ABDUL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

Comes now Daniel L. Abdul, appellant in the above-entitled cause, by his attorney, Howard K. Hoddick, and pursuant to the provision of Rule 17 (6) of the Rules of Practice for the United States Court of Appeals for the Ninth Circuit, hereby states that the appellant in taking this appeal relies upon the following errors which were made by the District Court:

1. The giving of erroneous instructions defining the term "wilful" as used in the odd numbered counts of the indictment;

2. The giving of erroneous instructions defining the term "wilful" as used in the odd numbered counts of the indictment on three separate occasions and on two such occasions separately from the balance of the instructions so that this error was impressed on the minds of the jury;

3. The giving of Plaintiff's requested instruction No. 11 concerning the duty of an employer to keep detailed and accurate payroll records at a convenient and safe location accessible to Internal Revenue Officers and open for inspection at all times by such officers which had no application to this case;

4. The giving of Plaintiff's requested instruction No. 22 which was both emotional and prejudicial to the Appellant;

5. The failure to give Defendant's requested instruction No. 35 on two occasions when the jury requested additional instructions on the definition of the term "wilful";

6. The refusal and failure to give Defendant's requested instructions numbered 27, 28, 29, 30, 37, 38, 40, 41, 42, 44, 45, 46, 48, and 54;

7. Admitting into evidence irrelevant and immaterial testimony of the witness James Walker which was highly prejudicial and thereafter denying Defendant's motion to strike the same and in the alternative his motion for a mistrial;

8. Admitting into evidence Plaintiff's Exhibits Nos. 1, 3, 8, 18, 19;

9. Allowing the prosecutor to ask repeated questions of the defendant as to immaterial, irrelevant and collateral matters as matters which would reflect on Defendant's credibility but as to which Plaintiff offered no further proof;

10. The Denial of Defendant's Motion for a New Trial.

Dated at Honolulu, T. H., this 11th day of April, 1957.

DANIEL L. ABDUL,
Appellant;

By /s/ HOWARD K. HODDICK,
His Attorney.

Service of copy acknowledged.

[Endorsed]: Filed April 12, 1957.

No. 15526.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SILVER STATE SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

JAMES CHALMERS YOUNG, Trustor of the Estate of
Carver House, Inc. Bankrupt.

Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S BRIEF.

SAMUEL S. LIONEL,

109 Friedman Building,

300 Fremont Street,

Las Vegas, Nevada,

Attorney for Appellant.

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No. 15526.

IN THE

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APPELLANT'S BRIEF.

Jurisdiction.

Jurisdiction of the District Court in this proceeding is based on Chapter X of the Bankruptcy Act (11 U. S. C. A. 501-676), the debtor having filed a voluntary petition for reorganization under the provisions of said chapter.

Jurisdiction of this Court on appeal is based upon Section 250 of the Bankruptcy Act (11 U. S. C. A. 650). The appeal is from an order making allowances of compensation to the trustee and the attorney for the trustee and making such allowances a first lien upon all the property of the debtor.

Statement of the Case.

The debtor filed a voluntary petition under Chapter X of the Bankruptcy Act in the United States District Court for the District of Nevada on April 18, 1956. On the same day, the said Court approved *ex parte* the said petition. The debtor had no funds at all [Tr. p. 57, line 6; p. 93, line 15].*

The appellant has at all times held two promissory notes of the debtor, one in the sum of \$50,000.00, and the other in the sum of \$175,000.00, secured by deeds of trust on the half completed Carver House Hotel owned by the debtor [Tr. p. 25, lines 8-10]. According to the debtor's petition, a trustee's sale of the hotel was scheduled to take place on April 24, 1956, by reason of a default in payment of the \$50,000.00 note held by appellant. The order approving the debtor's petition stayed the said sale.

A hearing was held on June 15, 1956, at which time appellant objected to the appointment of the trustee named in the order approving the petition. The objection was on the ground that the said trustee was not a disinterested party [Tr. p. 9, line 23, to p. 10, line 14]. The hearing was continued to July 12, 1956, at which time the Court was advised that the trustee was ill and intended to resign [Tr. p. 15, lines 5-12]. The Court suggested Mr. James Young as a successor, and no objection thereto was made [Tr. p. 15, lines 15-23].

The attorney for the trustee then advised the Court that a plan of reorganization was to have been submitted by July 15, 1956, and the Court set September 17, 1956, as the time for the trustee to present a plan or reasons

*All references are to pages and lines in the transcript.

why a plan could not be carried out [Tr. p. 15, line 24, to p. 16, line 19].

The September 17, 1956, hearing was changed by the Court to October 4, 1956. At that time the Court stated it was worried because it appeared that the proceeding was developing into a barrier between creditors and the debtor [Tr. p. 20, lines 9-23]. The Court then asked if there was a plan of reorganization [Tr. p. 20, line 23].

The attorney for the trustee stated that there was no plan [Tr. p. 20, lines 24-25; p. 21, line 21]. The trustee advised the Court that he was handicapped because it was one of the most involved operations he had ever been into and there were no records or books available [Tr. p. 22, lines 20-22]. The trustee further advised the Court that the hotel building was under condemnation and that it would be impossible to get liability insurance on the building unless some attempt was made to make the building safe, which would require money [Tr. p. 23, lines 5-14]. He further pointed out that he had no way of finding out where the money the debtor had received had gone, unless he resorted to subpoena procedure [Tr. p. 23, line 14, to p. 24, line 9]. No such procedure was resorted to, nor were any stockholders or officers of the debtor ever examined.

The Court then stated that under the circumstances it would be difficult to reorganize [Tr. p. 24, lines 10-12], and that the best thing to do would be to dismiss the proceedings and adjudicate the debtor a bankrupt [Tr. p. 24, lines 18-20]. The trustee and his attorney stated to the Court that if there was an adjudication, local businessmen who had mechanics liens would be wiped out,

and that they might be protected if there was a plan [Tr. p. 26, lines 5-17, 20-22; p. 27, lines 6-14].

Appellant's counsel then stated to the Court that since the proceeding had been commenced, \$18,000.00 worth of doors had been taken from the debtor's building, nothing had been done since the filing of the petition, and requested the Court to adjudicate the debtor a bankrupt [Tr. p. 33, line 23, to p. 34, line 9]. The Court stated that it "didn't know that anyone is seriously urging that there is a possibility of a plan here" [Tr. p. 33, lines 13-15], and stated that a plan should have been filed a long time ago [Tr. p. 34, lines 14-25].

The Court thereupon gave the trustee until November 7, 1956, to file a plan of reorganization [Tr. p. 52, lines 11-15], and set November 20, 1956, as the date for the Court to consider entering an order either adjudging the debtor a bankrupt or dismissing the proceedings [Tr. p. 55, lines 13-17].

On November 20, 1956, the trustee reported that no plan of reorganization could be effected [Tr. p. 63, lines 13-14]. He further reported that he could find no financial records of the debtor, and had been informed and believed none were kept [Tr. p. 63, lines 17-20], that it was doubtful that the hotel building was fifty per cent complete, and it had been under constant threat of condemnation by the City for the last month and presented a serious health and accident problem [Tr. p. 63, line 21, to p. 64, line 4]. The trustee further reported that he was informed and believed that much of the improvements which had been placed on the property, or were on the property for attachment thereto before he qualified, had been either stolen or removed [Tr. p. 64, lines 4-10].

The trustee reported that he was informed and believed

“that the improvements, such as they were, have materially depreciated and are subject to continued depreciation unless money can be provided forthwith for the protection of the improvements and the property” [Tr. p. 64, lines 10-14].

The trustee also reported that a recent appraisal of the debtor's property and improvements indicated a value of approximately \$120,000.00 [Tr. p. 65, lines 2-4], and the debts of the debtor, including the trust deeds held by the appellant, exceeded \$450,000.00 [Tr. p. 65, lines 7-11].

However, over the objections of appellant [Tr. p. 79, lines 6-8, 13], the Court continued the hearing until December 4, 1956, because the trustee and his attorney had failed to submit their petitions for allowances [Tr. p. 74, lines 9-16; p. 78, line 25, to p. 79, line 5].

Also, on November 20, 1956, the Court denied appellant's Motion to vacate the order approving the debtor's petition [Tr. p. 68, lines 17-21; p. 73, line 17].

On December 4, 1956, the Court adjudicated the debtor a bankrupt [Tr. p. 104, lines 16-24]. The trustee was awarded an allowance of \$1,000.00 [Tr. p. 93, lines 11-14]. The attorney for the trustee was awarded the sum of \$250.00 [Tr. p. 102, lines 1-3]. The Court ordered the allowances to the trustee and his attorney to be preferred claims over all secured claims [Tr. p. 102, lines 12-15]. The appellant objected to such preference [Tr. p. 102, line 22].

An order directing the said allowances and making them prior liens was entered by the Court on January 24, 1957.

Thereafter, and on February 28, 1957, a Petition for Leave to Appeal and Brief in support thereof was filed in this Court. On March 4, 1957, an order was entered granting the said petition. On March 16, 1957, a Motion for Leave to File Typewritten Transcripts was filed, and by letter dated April 12, 1957, appellant was advised that the said motion was approved.

Specification of Errors.

1. The Court below erred in making the allowances to the trustee and the attorney for the trustee a first lien upon the real property of the debtor.

Summary of Argument.

The allowances to a trustee and his attorney in an abortive Chapter X reorganization proceeding should be made a lien superior to that of a secured lienholder on real property having no equity, particularly where the proceedings were delayed due to requests of the trustee, who never presented any plan of reorganization, the debtor was hopelessly insolvent, the secured lienholder objected to the proceedings, and the security of the lienholder was impaired during the course of the proceedings.

ARGUMENT.

Administration Expenses in an Abortive Reorganization Proceeding Should Not Be Made a Lien on a Debtor's Real Property Superior to That of a Holder of a Trust Deed Thereon.

There appears to be no precise authority in this Circuit on the issue here presented. However, in *In re Williams Estate*, 156 Fed. 934, 939 (1907), this Court held that the general costs of the administration of a bankrupt estate, such as the general fees of the trustee and his attorney, were not payable out of the proceeds of a sale of liened property, where the proceeds of the sale were less than the amount of the liens. The Court there said that the proceeds

“ . . . are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of *Stewart v. Platt*, 101 U. S. 731, 739, 25 L. Ed. 816; *In re Utt*, 105 Fed. 754, 45 C. C. A. 32; *In re Prince & Walter* (D. C.), 131 Fed. 546, 552; *In re Bourlier Cornice & Roofing Co.* (D. C.), 133 Fed. 958, 963; *Loveland on Bankruptcy* (3d Ed.), p. 775. See, also, *Collier on Bankruptcy* (6th Ed.), p. 497.”

In *Duparquet v. Evans*, 80 L. Ed. 591, 595, 297 U. S. 216, 222, 223, the Supreme Court stated that under 77B of the Bankruptcy Act, "at times the holder of the lien may have his security modified or reduced by the plan of reorganization when finally approved." As authority therefor the Court cited *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 585; 79 L. Ed. 1593, 1602; 97 A. L. R. 1106; and *Continental Illinois National Bank & T. Co. v. Chicago, R.I. & P. R. Co.*, 294 U. S. 675-677, 79 L. Ed. 1127-1129.

In the *Louisville* case, the Supreme Court struck down on due process grounds provisions of the bankruptcy act which affected the rights of mortgagees. In its decision, the Court after tracing some of the history of the bankruptcy, said as follows (295 U. S. at 583, 79 L. Ed. at 1601):

"No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lien holders. In *Continental Illinois Nat. Bank & T. Co. v. Chicago, R.I. & P. R. Co.*, 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595, where, in a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act, the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this Court said: 'The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledges. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will

decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy, *Straton v. New*, 283 U. S. 318, 321, 75 L. Ed. 1060, 1088, 51 S. Ct. 465, 17 Am. Bank. Rep. (N. S.) 630, and cases cited.' (29 U. S. 676, 677.) 'The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy.' (294 U. S. 681.)"

The *Duparquet* case, *supra*, has been held by the Seventh Circuit to preclude the very action taken by the Court below in the case at bar. In the case of *In re Freeport Standard Dairy Corporation*, 124 F. 2d 783, 784, the Court of Appeals for that circuit affirmed a district court's refusal to make fees of a trustee and his attorney a lien prior to that of a mortgage lien where no plan of reorganization has been filed.

"The only question presented in this summary appeal is whether or not the District Court erred in refusing to subject the mortgaged real estate to the payment of the compensation allowed for the services of the trustee, his attorney, and the attorney for the debtor in the reorganization proceedings."

" . . .

"In considering this precise question under 77B, 11 U. S. C. A. §207, proceedings, this Court said: 'Duparquet Co. v. Evans, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591, seems to leave no doubt that a mortgage lien may not be impaired in a 77B proceeding before a final plan of reorganization has been approved.' *In re Forty-One Thirty-Six Wilcox Bldg. Corporation*, 7 Cir., 100 F. 2d 588, 593.

“See, also, Louisville Title Mortgage Company v. Louisville Storage Company, 6 Cir., 93 F. 2d 1008, affirming *In re Louisville Storage Company*, D. C., 21 F. Supp. 897; 8 C. J. S. Bankruptcy §872.

“The Chandler Act, providing a complete method of procedure in the reorganization of corporations in bankruptcy, has not changed this rule.”

And in 1946, the Seventh Circuit, in the case of *In re Sheridan View Bldg. Corporation*, 154 F. 2d 1008, 1009, quoting from *In re Forty-One Thirty-Six Wilcox Bldg. Corp.* (7 Cir.), 100 Fed. 588, said

“‘We are forced to conclude in view of such authorities that a court is without right to allow fees or expenses except where they have been earned or incurred in connection with the formation of a plan of reorganization which has been theoretically at least, of benefit to all parties in interest.’”

The Second Circuit has had occasion to consider the point here involved. *In re Franklin Garden Apartments*, 124 F. 2d 451, 454, was a reorganization proceeding in which the mortgagee had taken possession of the corporate debtor's property under the terms of the mortgage which provided for the assignment of rents in case of default. In authorizing the use of the rentals by the trustee to pay current operating expenses only and not administration expenses, the Court said:

“ . . . there seems no justification for allowing them at the present time, or indeed for allowing them at any time, out of the security belonging to the mortgagee, except insofar as the mortgaged property has received benefit through the proceeding (*Randolph v. Scruggs*, 190 U. S. 533, 23 S. Ct. 710,

47 L. Ed. 1165; *In re Centralia Refining Co.*, D. C. Ill., 35 F. Supp. 599, 602), or the mortgagee's rights are fully secured.' ”

The *Centralia* case quoted by the Second Circuit in the *Franklin* case, is similar to the instant case. The debtor petitioned for reorganization. Its petition was approved and a trustee appointed. No plan was approved and the corporation was adjudged a bankrupt. The Court there held that administration expenses were not chargeable against the lien property, saying at 35 Fed. Supp. 599, 602, the following:

“I am aware that this decision will work hardship upon innocent officers and appointees of the Court in the reorganization proceedings. This is to be regretted but there seems to be no lawful alternative. It must stand as warning to court, counsel and litigants to use care to avoid instituting corporate reorganization proceedings without the consent of the secured creditors in cases in which the available free assets or income are insufficient to meet the necessary costs of administration in event reorganization fails. Good faith in filing the petition is directly involved in such circumstances. I know of no valid reasons for a law which would permit the expenses of an abortive reorganization proceeding to be visited upon the holder of a valid pre-existing lien without his consent or fault.”

Even if there were no authorities on the issue here presented, it would most obviously be an injustice under the facts of this case to charge appellant with the administration expenses resulting from the reorganization proceeding. The appellant loaned money to the debtor

and received notes secured by deeds of trust on the debtor's real property. Upon default it sought to pursue its legal remedies. The debtor thwarted the appellant by filing a petition for reorganization and having the sale of debtor's property stayed. As a result, appellant has been unable to realize on the security. Even now it is tied up in a bankruptcy proceeding.

Despite the efforts of the appellant to have the proceedings dismissed, the trustee and his attorney kept the proceedings going [Tr. p. 26, lines 5-17, 20-22; p. 27, lines 6-14]. As a result, the security has depreciated [Tr. p. 64, lines 10-14], some of it has been stolen or removed [Tr. p. 64, lines 4-10], and it is under threat of condemnation [Tr. p. 63, line 21, to p. 64, line 4]. Although the deeds of trust secure notes in the sum of \$225,000.00, the value of the property secured had been reduced to approximately \$120,000.00 at the time the trustee filed his report [Tr. p. 65, lines 1-4].

The debtor was hopelessly insolvent. There was no going business. It had no funds [Tr. p. 57, line 6; p. 93, line 15]. All it had was a half-completed hotel [Tr. p. 63, lines 21-24]. Even the Court below recognized during the course of the proceedings that a plan of reorganization was not likely to be formulated [Tr. p. 20, lines 9-23; p. 24, lines 10-12; p. 33, lines 13-15]. Congress never intended that corporations, fit subjects for liquidation should be reorganized. (*Magidson v. Duggan*, 212 F. 2d 708, 760; *Price v. Spokane*, 97 F. 2d 237.)

If, under the facts of this case, a secured lienholder is charged with the allowances made by reason of the abortive proceeding, what good is a mortgage or a deed of trust? Would any lender be willing to lend money on

the security of a mortgage if the mortgagee may have to foot the bill for an abortive reorganization proceeding?

The appellant is an institution lending the money of its investors. Its loans are secured by deeds of trust on real property. Surely, its security should not be impaired by making the allowances of a proceeding of this nature a prior lien. The appellant believes that if this Court should rule that appellant's contention is correct, such a ruling will go far in preventing the institution of ill-fated reorganization proceedings, particularly in Nevada where a considerable number have been filed within the last year.

Conclusion.

For the reasons stated herein, appellant respectfully submits that the order of January 24, 1957, making the allowances to the trustee and the attorney for the trustee a first lien on the property of the debtor, be reversed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Appellant.

No. 15526.

IN THE

United States Court of Appeals

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SILVER STATE SAVINGS & LOAN ASSOCIATION,

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109 Friedman Building,

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Las Vegas, Nevada,

Attorney for Appellant.



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Jurisdiction of this Court on appeal is based upon Section 250 of the Bankruptcy Act (11 U. S. C. A. 650). The appeal is from an order making allowances of compensation to the trustee and the attorney for the trustee and making such allowances a first lien upon all the property of the debtor.

Statement of the Case.

The debtor filed a voluntary petition under Chapter X of the Bankruptcy Act in the United States District Court for the District of Nevada on April 18, 1956. On the same day, the said Court approved *ex parte* the said petition. The debtor had no funds at all [Tr. p. 57, line 6; p. 93, line 15].*

The appellant has at all times held two promissory notes of the debtor, one in the sum of \$50,000.00, and the other in the sum of \$175,000.00, secured by deeds of trust on the half completed Carver House Hotel owned by the debtor [Tr. p. 25, lines 8-10]. According to the debtor's petition, a trustee's sale of the hotel was scheduled to take place on April 24, 1956, by reason of a default in payment of the \$50,000.00 note held by appellant. The order approving the debtor's petition stayed the said sale.

A hearing was held on June 15, 1956, at which time appellant objected to the appointment of the trustee named in the order approving the petition. The objection was on the ground that the said trustee was not a disinterested party [Tr. p. 9, line 23, to p. 10, line 14]. The hearing was continued to July 12, 1956, at which time the Court was advised that the trustee was ill and intended to resign [Tr. p. 15, lines 5-12]. The Court suggested Mr. James Young as a successor, and no objection thereto was made [Tr. p. 15, lines 15-23].

The attorney for the trustee then advised the Court that a plan of reorganization was to have been submitted by July 15, 1956, and the Court set September 17, 1956, as the time for the trustee to present a plan or reasons

*All references are to pages and lines in the transcript.

why a plan could not be carried out [Tr. p. 15, line 24, to p. 16, line 19].

The September 17, 1956, hearing was changed by the Court to October 4, 1956. At that time the Court stated it was worried because it appeared that the proceeding was developing into a barrier between creditors and the debtor [Tr. p. 20, lines 9-23]. The Court then asked if there was a plan of reorganization [Tr. p. 20, line 23].

The attorney for the trustee stated that there was no plan [Tr. p. 20, lines 24-25; p. 21, line 21]. The trustee advised the Court that he was handicapped because it was one of the most involved operations he had ever been into and there were no records or books available [Tr. p. 22, lines 20-22]. The trustee further advised the Court that the hotel building was under condemnation and that it would be impossible to get liability insurance on the building unless some attempt was made to make the building safe, which would require money [Tr. p. 23, lines 5-14]. He further pointed out that he had no way of finding out where the money the debtor had received had gone, unless he resorted to subpoena procedure [Tr. p. 23, line 14, to p. 24, line 9]. No such procedure was resorted to, nor were any stockholders or officers of the debtor ever examined.

The Court then stated that under the circumstances it would be difficult to reorganize [Tr. p. 24, lines 10-12], and that the best thing to do would be to dismiss the proceedings and adjudicate the debtor a bankrupt [Tr. p. 24, lines 18-20]. The trustee and his attorney stated to the Court that if there was an adjudication, local businessmen who had mechanics liens would be wiped out,

and that they might be protected if there was a plan [Tr. p. 26, lines 5-17, 20-22; p. 27, lines 6-14].

Appellant's counsel then stated to the Court that since the proceeding had been commenced, \$18,000.00 worth of doors had been taken from the debtor's building, nothing had been done since the filing of the petition, and requested the Court to adjudicate the debtor a bankrupt [Tr. p. 33, line 23, to p. 34, line 9]. The Court stated that it "didn't know that anyone is seriously urging that there is a possibility of a plan here" [Tr. p. 33, lines 13-15], and stated that a plan should have been filed a long time ago [Tr. p. 34, lines 14-25].

The Court thereupon gave the trustee until November 7, 1956, to file a plan of reorganization [Tr. p. 52, lines 11-15], and set November 20, 1956, as the date for the Court to consider entering an order either adjudging the debtor a bankrupt or dismissing the proceedings [Tr. p. 55, lines 13-17].

On November 20, 1956, the trustee reported that no plan of reorganization could be effected [Tr. p. 63, lines 13-14]. He further reported that he could find no financial records of the debtor, and had been informed and believed none were kept [Tr. p. 63, lines 17-20], that it was doubtful that the hotel building was fifty per cent complete, and it had been under constant threat of condemnation by the City for the last month and presented a serious health and accident problem [Tr. p. 63, line 21, to p. 64, line 4]. The trustee further reported that he was informed and believed that much of the improvements which had been placed on the property, or were on the property for attachment thereto before he qualified, had been either stolen or removed [Tr. p. 64, lines 4-10].

The trustee reported that he was informed and believed “that the improvements, such as they were, have materially depreciated and are subject to continued depreciation unless money can be provided forthwith for the protection of the improvements and the property” [Tr. p. 64, lines 10-14].

The trustee also reported that a recent appraisal of the debtor’s property and improvements indicated a value of approximately \$120,000.00 [Tr. p. 65, lines 2-4], and the debts of the debtor, including the trust deeds held by the appellant, exceeded \$450,000.00 [Tr. p. 65, lines 7-11].

However, over the objections of appellant [Tr. p. 79, lines 6-8, 13], the Court continued the hearing until December 4, 1956, because the trustee and his attorney had failed to submit their petitions for allowances [Tr. p. 74, lines 9-16; p. 78, line 25, to p. 79, line 5].

Also, on November 20, 1956, the Court denied appellant’s Motion to vacate the order approving the debtor’s petition [Tr. p. 68, lines 17-21; p. 73, line 17].

On December 4, 1956, the Court adjudicated the debtor a bankrupt [Tr. p. 104, lines 16-24]. The trustee was awarded an allowance of \$1,000.00 [Tr. p. 93, lines 11-14]. The attorney for the trustee was awarded the sum of \$250.00 [Tr. p. 102, lines 1-3]. The Court ordered the allowances to the trustee and his attorney to be preferred claims over all secured claims [Tr. p. 102, lines 12-15]. The appellant objected to such preference [Tr. p. 102, line 22].

An order directing the said allowances and making them prior liens was entered by the Court on January 24, 1957.

Thereafter, and on February 28, 1957, a Petition for Leave to Appeal and Brief in support thereof was filed in this Court. On March 4, 1957, an order was entered granting the said petition. On March 16, 1957, a Motion for Leave to File Typewritten Transcripts was filed, and by letter dated April 12, 1957, appellant was advised that the said motion was approved.

Specification of Errors.

1. The Court below erred in making the allowances to the trustee and the attorney for the trustee a first lien upon the real property of the debtor.

Summary of Argument.

The allowances to a trustee and his attorney in an abortive Chapter X reorganization proceeding should be made a lien superior to that of a secured lienholder on real property having no equity, particularly where the proceedings were delayed due to requests of the trustee, who never presented any plan of reorganization, the debtor was hopelessly insolvent, the secured lienholder objected to the proceedings, and the security of the lienholder was impaired during the course of the proceedings.

ARGUMENT.

Administration Expenses in an Abortive Reorganization Proceeding Should Not Be Made a Lien on a Debtor's Real Property Superior to That of a Holder of a Trust Deed Thereon.

There appears to be no precise authority in this Circuit on the issue here presented. However, in *In re Williams Estate*, 156 Fed. 934, 939 (1907), this Court held that the general costs of the administration of a bankrupt estate, such as the general fees of the trustee and his attorney, were not payable out of the proceeds of a sale of liened property, where the proceeds of the sale were less than the amount of the liens. The Court there said that the proceeds

“ . . . are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of *Stewart v. Platt*, 101 U. S. 731, 739, 25 L. Ed. 816; *In re Utt*, 105 Fed. 754, 45 C. C. A. 32; *In re Prince & Walter* (D. C.), 131 Fed. 546, 552; *In re Bourlier Cornice & Roofing Co.* (D. C.), 133 Fed. 958, 963; *Loveland on Bankruptcy* (3d Ed.), p. 775. See, also, *Collier on Bankruptcy* (6th Ed.), p. 497.”

In *Duparquet v. Evans*, 80 L. Ed. 591, 595, 297 U. S. 216, 222, 223, the Supreme Court stated that under 77B of the Bankruptcy Act, "at times the holder of the lien may have his security modified or reduced by the plan of reorganization when finally approved." As authority therefor the Court cited *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 585; 79 L. Ed. 1593, 1602; 97 A. L. R. 1106; and *Continental Illinois National Bank & T. Co. v. Chicago, R.I. & P. R. Co.*, 294 U. S. 675-677, 79 L. Ed. 1127-1129.

In the *Louisville* case, the Supreme Court struck down on due process grounds provisions of the bankruptcy act which affected the rights of mortgagees. In its decision, the Court after tracing some of the history of the bankruptcy, said as follows (295 U. S. at 583, 79 L. Ed. at 1601):

"No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lien holders. In *Continental Illinois Nat. Bank & T. Co. v. Chicago, R.I. & P. R. Co.*, 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595, where, in a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act, the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this Court said: 'The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledges. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will

decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy, *Straton v. New*, 283 U. S. 318, 321, 75 L. Ed. 1060, 1088, 51 S. Ct. 465, 17 Am. Bank. Rep. (N. S.) 630, and cases cited.' (29 U. S. 676, 677.) 'The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy.' (294 U. S. 681.)"

The *Duparquet* case, *supra*, has been held by the Seventh Circuit to preclude the very action taken by the Court below in the case at bar. In the case of *In re Freeport Standard Dairy Corporation*, 124 F. 2d 783, 784, the Court of Appeals for that circuit affirmed a district court's refusal to make fees of a trustee and his attorney a lien prior to that of a mortgage lien where no plan of reorganization has been filed.

"The only question presented in this summary appeal is whether or not the District Court erred in refusing to subject the mortgaged real estate to the payment of the compensation allowed for the services of the trustee, his attorney, and the attorney for the debtor in the reorganization proceedings."

". . .

"In considering this precise question under 77B, 11 U. S. C. A. §207, proceedings, this Court said: 'Duparquet Co. v. Evans, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591, seems to leave no doubt that a mortgage lien may not be impaired in a 77B proceeding before a final plan of reorganization has been approved.' *In re Forty-One Thirty-Six Wilcox Bldg. Corporation*, 7 Cir., 100 F. 2d 588, 593.

“See, also, Louisville Title Mortgage Company v. Louisville Storage Company, 6 Cir., 93 F. 2d 1008, affirming *In re Louisville Storage Company*, D. C., 21 F. Supp. 897; 8 C. J. S. Bankruptcy §872.

“The Chandler Act, providing a complete method of procedure in the reorganization of corporations in bankruptcy, has not changed this rule.”

And in 1946, the Seventh Circuit, in the case of *In re Sheridan View Bldg. Corporation*, 154 F. 2d 1008, 1009, quoting from *In re Forty-One Thirty-Six Wilcox Bldg. Corp.* (7 Cir.), 100 Fed. 588, said

“‘We are forced to conclude in view of such authorities that a court is without right to allow fees or expenses except where they have been earned or incurred in connection with the formation of a plan of reorganization which has been theoretically at least, of benefit to all parties in interest.’”

The Second Circuit has had occasion to consider the point here involved. *In re Franklin Garden Apartments*, 124 F. 2d 451, 454, was a reorganization proceeding in which the mortgagee had taken possession of the corporate debtor's property under the terms of the mortgage which provided for the assignment of rents in case of default. In authorizing the use of the rentals by the trustee to pay current operating expenses only and not administration expenses, the Court said:

“ . . . there seems no justification for allowing them at the present time, or indeed for allowing them at any time, out of the security belonging to the mortgagee, except insofar as the mortgaged property has received benefit through the proceeding (*Randolph v. Scruggs*, 190 U. S. 533, 23 S. Ct. 710,

47 L. Ed. 1165; *In re Centralia Refining Co.*, D. C. Ill., 35 F. Supp. 599, 602), or the mortgagee's rights are fully secured.' ”

The *Centralia* case quoted by the Second Circuit in the *Franklin* case, is similar to the instant case. The debtor petitioned for reorganization. Its petition was approved and a trustee appointed. No plan was approved and the corporation was adjudged a bankrupt. The Court there held that administration expenses were not chargeable against the lien property, saying at 35 Fed. Supp. 599, 602, the following:

“I am aware that this decision will work hardship upon innocent officers and appointees of the Court in the reorganization proceedings. This is to be regretted but there seems to be no lawful alternative. It must stand as warning to court, counsel and litigants to use care to avoid instituting corporate reorganization proceedings without the consent of the secured creditors in cases in which the available free assets or income are insufficient to meet the necessary costs of administration in event reorganization fails. Good faith in filing the petition is directly involved in such circumstances. I know of no valid reasons for a law which would permit the expenses of an abortive reorganization proceeding to be visited upon the holder of a valid pre-existing lien without his consent or fault.”

Even if there were no authorities on the issue here presented, it would most obviously be an injustice under the facts of this case to charge appellant with the administration expenses resulting from the reorganization proceeding. The appellant loaned money to the debtor

and received notes secured by deeds of trust on the debtor's real property. Upon default it sought to pursue its legal remedies. The debtor thwarted the appellant by filing a petition for reorganization and having the sale of debtor's property stayed. As a result, appellant has been unable to realize on the security. Even now it is tied up in a bankruptcy proceeding.

Despite the efforts of the appellant to have the proceedings dismissed, the trustee and his attorney kept the proceedings going [Tr. p. 26, lines 5-17, 20-22; p. 27, lines 6-14]. As a result, the security has depreciated [Tr. p. 64, lines 10-14], some of it has been stolen or removed [Tr. p. 64, lines 4-10], and it is under threat of condemnation [Tr. p. 63, line 21, to p. 64, line 4]. Although the deeds of trust secure notes in the sum of \$225,000.00, the value of the property secured had been reduced to approximately \$120,000.00 at the time the trustee filed his report [Tr. p. 65, lines 1-4].

The debtor was hopelessly insolvent. There was no going business. It had no funds [Tr. p. 57, line 6; p. 93, line 15]. All it had was a half-completed hotel [Tr. p. 63, lines 21-24]. Even the Court below recognized during the course of the proceedings that a plan of reorganization was not likely to be formulated [Tr. p. 20, lines 9-23; p. 24, lines 10-12; p. 33, lines 13-15]. Congress never intended that corporations, fit subjects for liquidation should be reorganized. (*Magidson v. Duggan*, 212 F. 2d 708, 760; *Price v. Spokane*, 97 F. 2d 237.)

If, under the facts of this case, a secured lienholder is charged with the allowances made by reason of the abortive proceeding, what good is a mortgage or a deed of trust? Would any lender be willing to lend money on

the security of a mortgage if the mortgagee may have to foot the bill for an abortive reorganization proceeding?

The appellant is an institution lending the money of its investors. Its loans are secured by deeds of trust on real property. Surely, its security should not be impaired by making the allowances of a proceeding of this nature a prior lien. The appellant believes that if this Court should rule that appellant's contention is correct, such a ruling will go far in preventing the institution of ill-fated reorganization proceedings, particularly in Nevada where a considerable number have been filed within the last year.

Conclusion.

For the reasons stated herein, appellant respectfully submits that the order of January 24, 1957, making the allowances to the trustee and the attorney for the trustee a first lien on the property of the debtor, be reversed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Appellant.

**In the United States Court of Appeals
for the Ninth Circuit**

**UNITED MERCURY MINES COMPANY, A CORPORATION,
PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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FILED

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U.S. DEPT. OF JUSTICE



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,528

UNITED MERCURY MINES COMPANY, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 35-37) is not officially reported.

JURISDICTION

The petition for review (R. 38-40) involves a deficiency in excess profits tax for 1944 in the amount of \$113,453.68.¹ Taxpayer's income tax returns for 1944 and 1945 were filed with the Collector of In-

¹ The deficiency in this amount is partially offset by the Commissioner's tentative determination (See R. 11-12) of an over-assessment of \$57,071.69 in income taxes for 1944.

ternal Revenue for the District of Idaho. Taxpayer filed no excess profits tax returns for 1944 and 1945. (R. 23-34.) On February 1, 1955, the Commissioner mailed a notice of deficiency to the taxpayer advising it of a deficiency in excess profits tax in the amount of \$113,453.68 (R. 9-19). Within 90 days thereafter, on April 25, 1955, taxpayer filed a petition for redetermination of the deficiency under Section 272 of the Internal Revenue Code of 1939. (R. 3, 5-9.) On December 26, 1956, the Tax Court entered its decision, finding a deficiency in excess profits tax in the amount determined by the Commissioner (R. 38). The case is brought to this Court by a petition for review filed by the taxpayer on March 22, 1957. (R. 38-40.) Jurisdiction of this Court is invoked under the provisions of Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Taxpayer, a vendor under a "Conveyance, Royalty Agreement and Option" of tungsten properties, received royalty income from the vendee, who operated and worked the properties and extracted, transported, marketed and sold the ore. Taxpayer at no time engaged in the removal of ore for sale from the tungsten properties.

Did the Tax Court err in holding that such royalty income was not exempt from excess profits tax under Code Section 731 on the ground that taxpayer was not engaged in the mining of tungsten within the meaning of that section?

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 731 [as added by Sec. 226 (a), Revenue Act of 1942, c. 619, 56 Stat. 798]. CORPORATIONS ENGAGED IN MINING OF STRATEGIC MINERALS.

In the case of any domestic corporation engaged in the mining of * * * tungsten, * * * the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income.

(26 U.S.C. 1952 ed., Sec. 731.)

STATEMENT

A portion of the facts was stipulated. (R. 22-27.) The findings of the Tax Court (R. 28-35) may be summarized as follows:

Taxpayer is an Idaho corporation organized in 1921. Its authorized capital is \$500,000, consisting of five million shares of the par value of 10 cents per share, all of which are issued and outstanding. By its charter, taxpayer is authorized generally to engage in the mining business, to acquire, hold, manage, develop, operate, and work mining properties, together with the usual incidental powers. Since its incorporation taxpayer has been so engaged in an

area known as the Yellow Pine Mining District, Valley County, Idaho. (R. 28.)

In general, the mineral properties belonging to taxpayer in 1941 consisted of approximately 700 mining claims covering about 14,000 acres. These properties may be designated as follows (R. 28-29):

1. *The Stibnite Property.* This consisted primarily of two groups of mining claims, the first known as the Meadow Creek group, and the second known as the Hennessy group or East Fork group. The Hennessy group contained large deposits of Tungsten ore.
2. *The Midnight Group.* This consisted of mining claims located near the Stibnite property.
3. *Smokey Ridge Group.* This consisted of mining claims located near the Stibnite property.
4. *Antimony Ridge Group.* This consisted of quicksilver, gold and antimony mining claims lying northwest of the Stibnite property.
5. *Cinnabar Group.* This consisted of quicksilver mining claims lying east of the Stibnite property.

The Bradley Mining Company, hereinafter referred to as Bradley, was organized under the laws of California for the purpose of engaging in the mining business. Bradley was a large operating concern with considerable working capital.

On August 5, 1927, taxpayer negotiated an option agreement with Bradley for the development and operation of the Meadow Creek and Cinnabar claims. The agreement also granted Bradley an option to purchase taxpayer's title in the mining claims for \$1,500,000. In the meantime taxpayer was to receive

certain payments which were to be credited toward the purchase price. The agreement of August 5, 1927, did not extend to the Hennessy mining claims which were purchased outright by Bradley in 1927. After spending approximately \$30,000 on the Hennessy claims, Bradley abandoned them. Taxpayer reacquired the Hennessy claims and they were included, along with the Meadow Creek claims, in subsequent agreements executed between Bradley and taxpayer in 1930 and 1939. These two groups of claims comprised the Stibnite mining properties heretofore mentioned. (R. 29-30.)

The acquisition of the Hennessy claims was described in the option agreement dated May 16, 1939, as follows (R. 30):

AND WHEREAS, subsequent to said agreement on October 3, 1930, the Yellow Pine Company and its successor in interest, the Bradley Mining Co., acquired a group of mining claims known as the Hennessy Group, which said group of claims was acquired with the understanding and agreement that it would become a part of the Meadow Creek Group of lode mining claims and to be owned by the United Mercury Mines Company until the acquisition of the entire Meadow Creek Group by the Yellow Pine Company; * * *

On September 4, 1939, Bradley and taxpayer executed a "Form of Agreement For Mineral Explorations" granting to the Government the right to enter upon the Stibnite property for the purpose of prospecting, drilling, and exploring for minerals. The exploratory operations were not commenced until the summer of 1941. The drilling was at Government

expense, under the supervision of the Bureau of Mines, and resulted in the discovery of tungsten. (R. 30.)

The contractual relationship which had existed between Bradley and taxpayer from 1927 to 1941 was terminated on December 31, 1941, and on the same date a new agreement designated "Conveyance, Royalty Agreement, and Option", was executed. (R. 30-31.) That agreement provides in part as follows (R. 31-32):

That the said UNITED [taxpayer] for and in consideration of the royalty hereinafter agreed to be paid by BRADLEY * * * has GRANTED, BARGAINED, SOLD, and ASSIGNED, and does by these presents grant, bargain, sell and assign, unto BRADLEY * * * all of the following described lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, consisting of two groups of lode mining claims, the first of said groups being commonly known as the MEADOW CREEK Group, and the second of said groups being commonly known as the HENNESSY Group * * *.

Together with the personal property situated upon said mining claims;

Together with all millsites, power plants, transmission lines, dams, reservoirs, mills, dwellings, buildings, structures, water rights, tail races, tailing sites, tailing dams or easements * * * TO HAVE AND TO HOLD, subject to the royalty herein reserved and retained by UNITED, all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said BRADLEY, its successors and assigns, forever.

* * * *

For and in consideration of the premises * * * BRADLEY * * * does hereby covenant, promise and agree to pay to UNITED * * * a royalty of five percent (5%) on all net smelter returns, net revenue, and net mint returns, as defined herein * * *; the payment of said five percent (5%) royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after Midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above described property * * *.

* * * *

It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of BRADLEY * * * and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.

Anything in this agreement contained to the contrary notwithstanding, it is the intention of the parties to this agreement that the full ownership, possession and control of all the properties above described, * * * and all of the personal property acquired and/or used on or in connection with the operation and development of the above described properties, shall be vested in BRADLEY, and the UNITED shall have no interest in fee in or to said properties, or in and to any of the personal property acquired and/or used in connection with the operation and development of said properties; * * *.

After 1941 the operations conducted by Bradley were primarily directed toward the development and mining of tungsten from the Hennessy mine. Between 1927 and 1933 Bradley expended in excess of \$100,000 per year in development of the properties under the option agreements. (R. 32-33.)

The option agreement dated May 16, 1939, provided in part as follows (R. 33):

AND WHEREAS, the party of the second party [Bradley] went into actual possession of said properties and began bona fide development work thereon upon the signing of and in accordance with the provisions of said option agreement dated August 5th, 1927, and has during each and every year thereafter expended in developing and equipping in, upon, and/or for the benefit of said properties a sum of not less than twenty-four thousand dollars (\$24,000.00);

Bradley erected mine buildings, a concentration plant, and other buildings, and installed the power generating equipment. It owned the equipment, machinery, and other personal property located at the mine. Bradley operated the Stibnite properties. It extracted, transported, marketed and sold the ore and received the payments from purchasers. At no time before or after the 1941 contract did taxpayer engage in the removal of ore for sale from the Stibnite and Midnight group of properties. (R. 33.)

The relationship between taxpayer and Bradley was not always harmonious. Differences frequently arose with respect to provisions of the agreements which were amicably adjusted. However, sometime subsequent to the taxable year taxpayer instituted a

suit against Bradley which involved an issue with respect to royalty computations. *United Mercury Mines v. Bradley Mining Co.*, 233 F. 2d 205 (C.A. 9th). (R. 33-34.)

Taxpayer was engaged in mining the Cinnabar property for quicksilver in 1944 and 1945. In 1941 taxpayer deeded a 55 per cent interest in the Cinnabar property to Bonanza Mines, Inc. The Cinnabar property had not been worked prior to the transfer. Thereafter a reduction plant was built and the property was operated as a joint venture by taxpayer and Bonanza. Taxpayer also worked the Antimony Ridge property for antimony in 1944 and 1945. This mining operation resulted in losses during the period 1941 to 1944, inclusive. In 1947 the Antimony Ridge property was transferred to Bradley. (R. 34.)

In its income and declared value excess profits tax return for 1944 taxpayer reported the following (R. 34):

| | |
|-------------------------------|------------------|
| Royalty income under contract | |
| dated December 31, 1941..... | \$219,439.42 |
| Income from operation of | |
| Antimony Ridge mine..... | (14,160.36) Loss |
| Income from operation of | |
| Bonanza mine | (15,035.87) Loss |
| <hr/> | |
| Total income reported..... | \$190,243.19 |

Taxpayer did not file an excess profits tax return for 1944. (R. 28.) The Commissioner determined that its royalty income from the Stibnite property in 1944 was not exempt from taxation under Section 731 of the 1939 Code and accordingly determined the

deficiency in excess profits tax in issue here. (R. 15, 34-35.)

The Tax Court affirmed the Commissioner's deficiency determination, finding as a fact (R. 35) and holding (R. 35-37) that in 1944 taxpayer was not engaged in the mining of tungsten from the Stibnite property within the purview of Section 731 of the Code.

SUMMARY OF ARGUMENT

The Tax Court correctly held that the taxpayer was not exempt from excess profits tax under 1939 Code Section 731 with respect to the royalty income from tungsten which it received in 1944 from properties it had sold to Bradley in 1941. Section 731 is applicable only to a corporation "engaged in the mining of" "certain specified minerals. The statute, by its plain language, is concerned only with corporations engaged in making or working a mine, and deriving income therefrom. The mere recipient of a royalty interest, such as the taxpayer in this case, is clearly not engaged in doing either.

In addition to the plain language of the statute, its history and purpose are consistent with the result reached by the Tax Court, and they preclude any argument that this extraordinary tax exemption was intended to be available to a corporation which was merely the passive recipient of royalty income during the taxable year.

Even assuming, *arguendo* only, that a broader definition of mining should be adopted so as to include treatment processes, the taxpayer here still cannot

in any sense be considered to have been engaged in mining tungsten from the Stibnite properties in 1944. That taxpayer had engaged in mining on other properties, or that it had done some development work on this property many years prior to the taxable year, or that it did development work on nearby properties during the taxable year, does not qualify it for exemption in 1944 with respect to the royalties from tungsten.

ARGUMENT

The Taxpayer Was Not Engaged In Mining Tungsten During the Taxable Year; Its Royalty Income from the Tungsten Properties It Had Previously Sold Was Not Exempt from Excess Profits Tax Under 1939 Code Section 731

The sole issue in this case is whether the royalty income received in 1944 by the taxpayer from tungsten properties it had conveyed to Bradley in 1941 is subject to the excess profits tax, as the Tax Court held (R. 35-37) or whether, as the taxpayer claims (Br. 6-18), that income is completely exempt from tax because of the provisions of Section 731 of the Internal Revenue Code of 1939, *supra*. It is submitted that the Tax Court was entirely correct in holding that the statutory exemption does not extend to a corporation, such as the taxpayer, which was only the passive recipient of royalties and did not perform any active function during the taxable year relating to the mining of tungsten. Such a corporation is not "engaged in the mining" of strategic minerals, and the statute grants it no exemption.

The Tax Court relied (R. 36-37) on this Court's

holding in *Oregon Chrome Mines, Inc. v. Commissioner*, 192 F. 2d 783, as controlling here. Contrary to taxpayer's contention (Br. 5), that case is indistinguishable. The *Oregon Chrome Mines* case involved a chrome mine operated by a lessee, whereas the instant case involves a tungsten mine operated by a vendee, but otherwise the facts are not materially different.

Furthermore, it is submitted there is no merit to the taxpayer's argument (Br. 5-7, 10, 13) that this Court's reasoning in the *Oregon Chrome Mines* case, *supra*, was improper and erroneous. Taxpayer contends that the legislative history of Section 731, *supra*, shows that the term "engaged in mining" is broader than the construction given by this Court in the *Oregon Chrome Mines* case. It will be recalled that the Tax Court in that case pointed out (15 T.C. 389, 393) that according to its more usual and ordinary definition, "mining" does not include treatment processes but, even if the broader definition in 1939 Code Section 114(b)(4)(B) were applied, the taxpayer there could not be considered as being engaged in mining chromite in the taxable year for the purposes of 1939 Code Section 731. In affirming the Tax Court, 192 F. 2d 783, 784-785, this Court held that the word "mining" as used in Section 731 is limited to its ordinary and usual definition. That conclusion is supported by convincing authority.

Wherever possible, the words of statutes must be given their ordinary everyday meaning. *Crane v. Commissioner*, 331 U.S. 1, 6; *Helvering v. Northwest Steel Mills*, 311 U.S. 46, 49; *Old Colony R. Co.*

v. *Commissioner*, 284 U.S. 552, 560. In accord with both the Tax Court and this Court's reasoning in the *Oregon Chrome Mines* case, the plain ordinary meaning of the statute here covers only the active processes of digging mines and removing the minerals from their source. By limiting the exemption to corporations engaged in mining, Congress clearly intended that Section 731 should apply only to corporations deriving income from working a mine. See the definition of "mining" in Webster's International Dictionary (Second ed.) as the "Act or business of making or of working mines."

The taxpayer here, which derived the royalty payments in question from the mining activities of others and which performed no mining activity with respect to tungsten during the taxable year, could scarcely be described as engaged in working a tungsten mine. According to the ordinary meaning of the statute, the taxpayer's income from tungsten royalties clearly was not intended to be exempt from the excess profits tax. Moreover, since Section 731 creates an exemption from tax, it must be strictly construed. *New Colonial Co. v. Helvering*, 292 U.S. 435, 440; *White v. United States*, 305 U.S. 281, 292; *Deputy v. Du Pont*, 308 U.S. 488, 493; *Helvering v. Northwest Steel Mills*, *supra*, p. 49; *Commissioner v. Jacobson*, 336 U.S. 28, 49.

Contrary to taxpayer's contention (Br. 8-13), the history and purpose of the statute, moreover, are persuasive that Congress used the term "mining" in its ordinary sense, and did not intend that the exemption should be applicable to corporations not actively

engaged in working a mine. A corresponding section was added to the Code when the excess profits tax was imposed by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974. It had its origin in an amendment adopted by the Senate and, as it passed the Senate, the amendment would have added Section 730 to the Code as follows (H. R. 10413, 76th Cong., 3d Sess.) :

SEC. 730. INCOME FROM MINING OPERATIONS.

Income derived from the mining reduction or beneficiation of tungsten, quicksilver, manganese, platinum, antimony, chromite, and tin, or the ores and material containing such metals, shall not be subject to the excess-profits tax provided for in this Act.

While the explanation given in support of the amendment by Senator Pittman (86 Cong. Record, Part. 11, pp. 12347-12348) did not indicate the precise scope of the section, it should be noted that the amendment related to "income derived" from the enumerated functions; thus, although such does not seem to have been the express object of the sponsor of the amendment, it might have been possible for taxpayers to urge that it was intended to extend the exemption to any recipient of such income.

This possibility, however, was removed when the amendment was altered in conference so as to be Section 731 of the Code and to be similar to Section 731 of the Code as it relates to the taxable year here in question; for as finally enacted, the insertion of the requirement that, to claim the exemption, the corporation must be "engaged in the mining" would

seem to have been designed to dispel any notion that a recipient of royalty income could claim the exemption merely because the income had its origin in the mining activities conducted by another taxpayer. Thus, in explaining the changes made by the conferees, Senator Harrison said (86 Cong. Record, Part 12, p. 12919) "we were able to work out a compromise *confining the exemption to the mining* of such metals by domestic corporations * * *." (Italics supplied.) The emphasis, it should be noted, was in relation to an active mining function, not to a passive collection of royalties.

The purpose of Section 731, moreover, is such that there would have been no cogent necessity impelling Congress to extend the tax exemption to corporations which merely receive royalties and which are not themselves currently engaged in mining activities. Section 731, which was repealed in 1941,² re-enacted with retroactive effect in 1942,³ and amended to include additional minerals in 1943,⁴ had the obvious purpose of encouraging the production of these critical minerals. See H. Conference Rep. No. 3002 76th Cong., 3d Sess., pp. 55-56 (1940-2 Cum. Bull. 548, 559-560); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 211 (1942-2 Cum. Bull. 504, 658-659); H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 64 (1942-2 Cum. Bull. 701, 722); H. Rep. No. 871, 78th Cong., 1st Sess., p. 58 (1944 Cum. Bull. 901, 944);

² Section 205, Revenue Act of 1941, c. 412, 55 Stat. 687.

³ Section 226, Revenue Act of 1942, c. 619, 56 Stat. 798.

⁴ Section 207, Revenue Act of 1943, c. 63, 58 Stat. 21.

S. Rep. No. 627, 78th Cong., 1st Sess., pp. 74-75 (1944 Cum. Bull. 973, 1027). It is significant, moreover, that in none of the hearings, debates or committee reports was it ever suggested that this extraordinary tax exemption should be made available to corporations which merely received royalty income and which did not participate in the risk taking which is involved when another corporation engages in the actual extraction process which constitutes the working of a mine. See Seidman's Legislative History of Excess Profits Tax Laws (1946-1947), pp. 212-216.

This is not to overlook the general impact of the excess profits tax on those corporations possessing an interest in mineral deposits which accelerated production from limited natural deposits in response to the country's war need. Relief from excess profits tax which would otherwise have been imposed on the income from such accelerated production was granted by Section 735 of the 1939 Code (in conjunction with Code Section 711 (a) (1) (I) and (a) (2) (K)) which was calculated to measure the amount of the relief by the extent to which production was accelerated. Section 731, however, with the complete exemption which it afforded to corporations engaged in mining was plainly designed to accomplish an altogether different objective, an objective which, as we have seen, would not encompass taxpayers which were the passive recipients of royalty payments.

The record here clearly shows that Bradley rather than the taxpayer conducted the tungsten mining operations on the Stibnite properties in 1944. It was stipulated that during 1944 and 1945 Bradley oper-

ated the Stibnite properties, built mine buildings, installed the power generating equipment, concentration plant, and other buildings; that Bradley owned the equipment, machinery and other personal property located at the mine; that Bradley operated and worked the Stibnite properties, and extracted, transported, marketed and sold the ore and received the payments from the purchasers; and that at no time before or after the execution of the 1941 contract did taxpayer ever engage in the removal of ore for sale from the Stibnite properties or from the Midnight Group. (R. 25-26.)

Taxpayer argues (Br. 4) that it had engaged in mining activities since its incorporation in 1921 so as to be entitled to the exemption of the statute. The exemption in this case, however, pertains solely to whether the taxpayer was engaged in mining tungsten on the Stibnite properties in 1944. The record references given in support of the taxpayer's argument (Br. 4) all relate to activities in mining other metals on other properties and in other years. The Commissioner has never questioned that taxpayer at all times since its incorporation has been engaged in mining in the Yellow Pine District, or that in 1944 and 1945 it was engaged in mining quicksilver on the Cinnabar property and engaged in mining antimony on Antimony Ridge. It was so stipulated. (R. 24, 26-27.) The *Oregon Chrome Mines* decision, *supra*, does not rest on the fact that the taxpayer there was not engaged in other mining activities.

As to the Stibnite mines, Bradley had worked and operated them for the purposes of mining metals

other than tungsten from 1927 to 1941, under option agreements from the taxpayer. (R. 29-30, 33.) In 1941, tungsten was discovered on the Hennessey tract of the Stibnite mines as the result of drilling operations of the Bureau of Mines, done at Government expense. (R. 73-74.) On December 31, 1941, the taxpayer deeded the Stibnite mines to Bradley and thereafter taxpayer ceased to own any legal interest in the mines except the right to royalties pursuant to the terms of the contract. (R. 31-32.) Even in the years prior to 1941, taxpayer had done nothing with respect to the actual mining of ore, either tungsten or other metals, from the Stibnite area.

Taxpayer contends that it was instrumental in the development of the Stibnite property and made large capital investments. (Br. 4.) Bradley as well as the taxpayer signed the minerals exploration contract with the Bureau of Mines. (Ex. 9, R. 74.) The record indicates that the discovery of tungsten was largely fortuitous. However, who developed the mining operations prior to the taxable year is not believed to be material here. The record shows that whatever taxpayer spent on the property was long prior to the taxable year, whereas Bradley had put at least \$100,000 a year into development of the property from 1927 to 1933, although the option agreements had obligated it to spend not over \$25,000 a year. (R. 32-33, 73-76, 118.) The record shows that the sale of the Stibnite property to Bradley in 1941 was made because Bradley had the capital to put into the enterprise, whereas the taxpayer did not. (R. 117.)

Taxpayer suggests that it was instrumental in clearing highways so that electric power could be obtained in the Stibnite area. (Br. 4.) The record shows that taxpayer's activities in this respect were as beneficial to its Cinnabar, Smokey Ridge, and Midnight properties as to the Stibnite properties owned by Bradley. (R. 88-90.) The December 31, 1941, contract between taxpayer and Bradley provided (R. 32):

It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of Bradley * * * and that the failure of Bradley to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.

After that date, the taxpayer had only a royalty interest in the Stibnite property and was merely a passive collector of royalty payments derived from income resulting from Bradley's tungsten mining activities.

Even assuming, *arguendo* only, that treatment processes are included in the term "engaged in the mining" as well as extraction of the ore, the record here does not show that taxpayer was engaged in mining tungsten in 1944. The testimony with respect to taxpayer voluntarily bearing a portion of the cost Bradley incurred for treatment facilities (R. 92-95, 129) is vague and inconclusive. Certainly, there was no obligation on the taxpayer under the terms of the 1941 contract to pay any part of this cost.

Taxpayer is not aided by the administrative ruling

(I.T. 3482, 1941-1 Cum. Bull. 288) on which it relies (Br. 8, 10-12, 18, 22-24). The ruling is an informal one which does "not commit the Department to any interpretation of the law." *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 468. Moreover, the ruling is relied upon only in support of a contention that taxpayer was engaged in the mining of tungsten in 1944 on the theory that it is to be treated as a lessor with an economic interest which entitled it to a depletion deduction on the royalties it received from Bradley. The right to depletion depends upon the receipt of "gross income from the property" (See Section 114 (b) (4) of the 1939 Code, 26 U.S.C. 1952 ed., Sec. 114), which includes royalty income received by a lessor (See *Burnet v. Harmel*, 287 U.S. 103), and, as the Court stated in the *Oregon Chrome Mines* case (p. 284):

That the royalty income falls within that portion of the statute dealing with income attributable to mining there is no dispute.

However, under Section 731 exemption is not for income *attributable to* mining; as related to taxpayer, exemption is accorded only to a corporation "engaged in the mining of * * * tungsten." That this language does not include a corporation whose only relation to the mining of tungsten is in the receipt of royalties as a lessor is supported, as the Court stated in the *Oregon Chrome Mines* case (p. 785), by the fact that it was not until 1950 (long after the taxable year here involved) that Congress saw fit to include a separate provision in order to bring a lessor corporation within the statute. Moreover, in the *Oregon*

Chrome Mines case the taxpayer definitely was a lessor, whereas here taxpayer merely assumes that it may be treated as a lessor on the basis of its assertion that it was entitled to depletion on the royalties involved. In any event, one who in the circumstances of this case owns a depletable economic interest consisting only of a net profits interest (see, e.g., *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25) is certainly not "engaged in the mining of" ore, as required for exemption under Section 731.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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OCTOBER, 1957

IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
a corporation,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

PETITIONER'S OPENING BRIEF

JOHN A. CARVER, JR.,
Continental Bank Building
Boise, Idaho

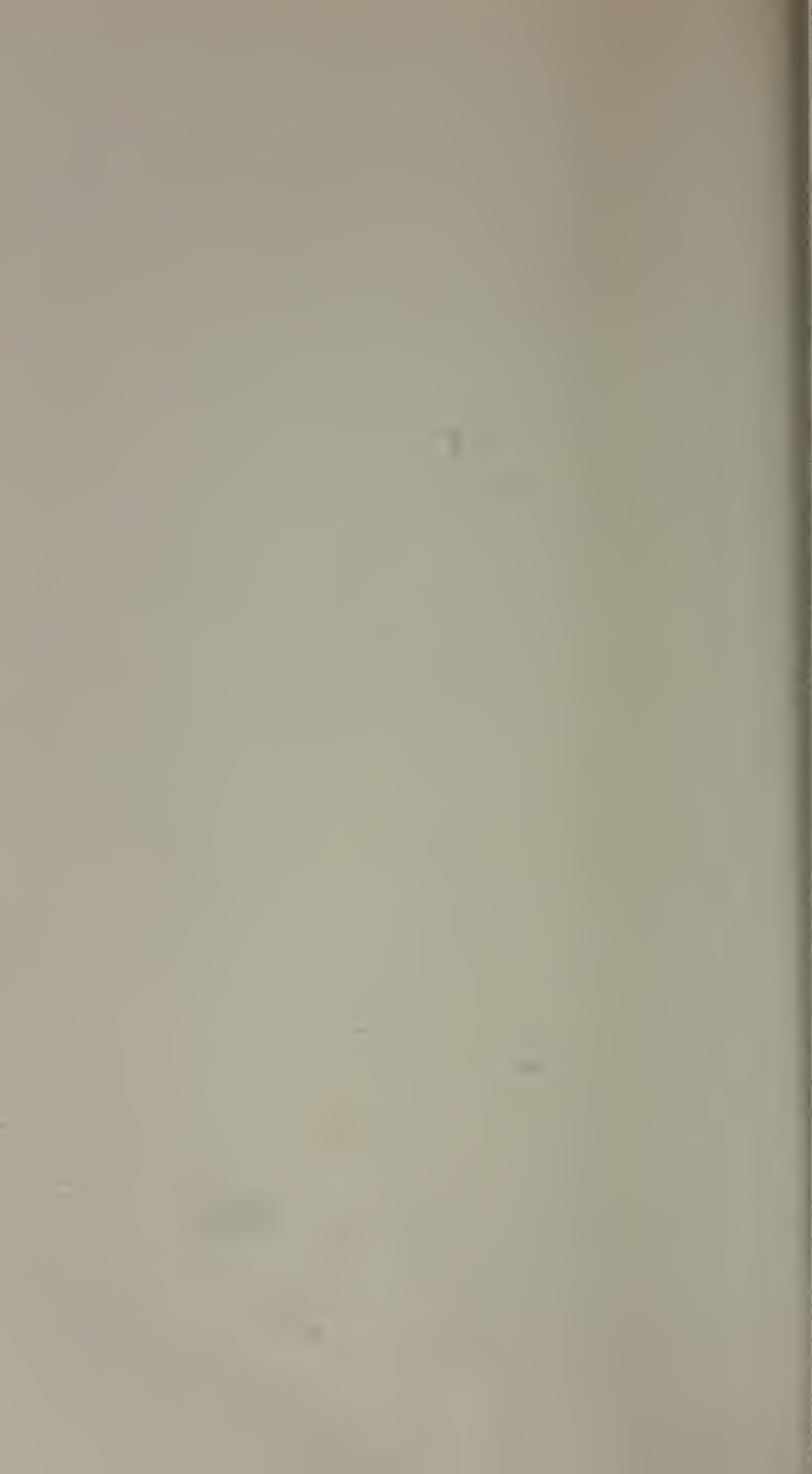
DALE CLEMONS,
Idaho Building,
Boise, Idaho,
Attorneys for Appellant.

.....Clerk

Filed.....

FILED

MAY 21 1957



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Attorneys for Appellant.

.....Clerk

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IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
a corporation,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

PETITIONER'S OPENING BRIEF

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT:

Now comes United Mercury Mines Company, a corporation, the Petitioner on Review (appellant) by its attorneys, John A. Carver, Jr. and Dale Clemons, and respectfully shows:

I

JURISDICTION

Petitioner on Review, United Mercury Mines Company, a corporation, is a corporation organized and

existing under the laws of the State of Idaho. (R. 28)*

On March 9, 1945, the appellant filed its tax return for the calendar year 1944 with the Collector (now Director) of Internal Revenue for the District of Idaho (R. 28), which office is located in Boise, Idaho, within the jurisdiction of the United States Court of Appeals for the Ninth Circuit where this review is sought.

The Respondent on Review is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States.

This petition for review is brought pursuant to 26 U.S.C.A. Sections 7481 to 7483 (Sections 7481 to 7483 Internal Revenue Code).

II

PRIOR PROCEEDINGS

On March 9, 1944 the appellant (petitioner below) filed its tax return with the Collector of Internal Revenue for the District of Idaho, for the calendar year 1944. (R. 28)

On February 1, 1955, (R. 5, 9-19, 21) the Commissioner of Internal Revenue mailed appellant a notice of deficiency for said taxable year 1944.

On April 25, 1955, (R. 3, 20) within ninety days of the date of the said mailing of notice of deficiency, the appellant filed its petition before the Tax Court of the United States for a redetermination of the

*Arabic numerals following the letter R. refer to pages of the Transcript of Record.

deficiency set forth in said notice dated February 1, 1955.

On December 26, 1956, the Tax Court of the United States filed and entered its opinion sustaining the determination made by the Commissioner of Internal Revenue (R. 37) and on December 26, 1956 entered its decision awarding a deficiency in excess profits tax for the year 1944 in the amount of \$113,453.68 (R. 38).

On March 22, 1957, (R. 39-40) the appellant filed with the said Tax Court of the United States its petition for review, and on April 9, 1957, filed with said court its Designation of Contents of Record on Appeal, (R. 40).

On April 26, 1957 the Clerk of the said Tax Court filed with the Clerk of the United States Court of Appeals for the Ninth Circuit the Record on Review (R. 149-150).

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

So far as they go, the Tax Court's Findings of Fact (R. 27-35) (save the last two, which, of course, are really conclusions of law) fairly state the operable facts, and will not be repeated here.

Suffice it to say that Petitioner had been involved in a continuous course of activity since 1921 for the prospecting, location or other acquisition and development of certain mining properties (Stip. Facts, par. 4; R. 24, 100), (including exploration, blocking out of ore, construction of workings and service

facilities) (R. 32-33, 36, 56, 57-59, 63-64, 66-67, 76) both before and after they were subjected to contracts with Bradley Mining Company giving Bradley the right to work them exclusively. It had a capital commitment of several hundred thousand dollars (R. 79, 84-86, 112) in the general area. It engaged actively in operating nearby properties, including the extraction of ore, and its income was not confined to royalty payments (R. 13-14, 26-27). It was instrumental in getting the properties contracted to Bradley drilled, (R. 73, 76-78, 143) and in getting electric power to the area (R. 88). It voluntarily bore a portion of the cost of construction of treatment facilities for the ore mined by Bradley, (R. 92-95, 97) and bore a disproportionate share of the cost of transportation of the ore from Cascade to Boise, Idaho (R. 98).

The petitioner has been granted a depletion allowance for the tax year in question (R. 100).

Nevertheless, since Bradley, and only Bradley, extracted the ore from the earth in 1944, Petitioner has been denied the exemption of Section 731, and the controversy is whether the Petitioner's adjusted excess profits net income for the year 1944 was or was not exempt by virtue of Section 731 of the Internal Revenue Code.

Petitioner's contention is that it was engaged in the mining of tungsten, during the year in question, and that its adjusted excess profits net income was attributable to such mining and therefore exempt from the excess profits tax.

In this connection, Petitioner makes these contentions:

(1) *Oregon Chrome Mines, Inc., vs. Commission*, 192 F (2d) 783, held by the Tax Court to be controlling in the instant case, should not control for these reasons:

(a) In that case, the Tax Court had found that Petitioner was not "engaged in mining" in the usual and ordinary definition, having remained passive, performed no function, and taken no risk, and was not engaged in other mining. As to these tests, the cases are not parallel.

(b) It was unnecessary, and dictum, for this Court, therefore, to make its decision rest upon the test of "extraction," since the Petitioner there was not engaged in mining in the usual and ordinary sense of the term.

(2) *Oregon Chrome Mines, Inc. v. Commissioner* applies an improper and erroneous test to determine exemption and the rule stated ought to be corrected now.

(a) It was error for the Tax Court to consider itself bound by *Oregon Chrome*. *Oregon Chrome* is not parallel on the facts, and the "extraction" test was unnecessary and dictum.

(b) The legislative history and statutory context of Section 731 shows that the term "engaged in mining" is broader than the term

“extracts minerals,” and should not be so limited in determining exemption under Section 731.

SPECIFICATION OF ERRORS RELIED UPON

The Tax Court erred:

(1) In denying Petitioner the exemption claimed under Section 731, Internal Revenue Code, as to its adjusted excess profits net income for the year 1944.

(2) The Tax Court erred in failing to find that Petitioner was engaged in mining tungsten in 1944, within the meaning of Section 731, I.R.C.

(3) The Tax Court erred in holding *Oregon Chrome Mines, Inc. vs. Commissioner*, 192 F(2d) 783, to be controlling.

ARGUMENT

It was error for the Tax Court to consider itself bound by *Oregon Chrome*. *Oregon Chrome* is not parallel on the facts, and the “extraction” test was unnecessary and dictum.

Since the consideration of this case involves, we believe, a reanalysis of the *Oregon Chrome* case, upon which the Tax Court based its decision, the Court is respectfully urged to review the majority and minority opinions in the Tax Court opinion in that case, and to compare the position of the Petitioner there with the position of the Petitioner here.

It will be seen immediately that the Tax Court’s 5-4 split turned upon weaknesses in the petitioner’s factual position in the precise areas where petitioner

here is strong; that the reasons asserted by the minority judges for their dissent apply with special force; and that the petitioner here could satisfy the somewhat equivocal reasons announced by the majority judges for their decision.

The following of dictum is perhaps not precisely the proper term to describe the error, as the Petitioner conceives it, of the application of *Oregon Chrome* to the instant case.

We think this Court selected a new reason for affirmance, not considered in the Tax Court. For reasons set forth hereafter we think the reason given not supportable. But we also think the Tax Court should have held, in this case, that the application of the "extraction" test was not necessary to affirm *Oregon Chrome*, and therefore it should not have held itself bound by it. To do so was error.

To say that United Mercury Mines Company was not engaged in mining in 1944 is impossible. On the facts, *Oregon Chrome* is not at all a parallel for denying the exemption, for there the activities were so absent, the role so passive, as to deny the exemption.

Oregon Chrome Mines, Inc. vs. Commissioner applies an improper and erroneous test to determine exemption and the rule stated ought to be corrected now.

(a) *The Legislative history and statutory context of Section 731 shows that the term "engaged in mining" is broader than the term "extracts minerals," and should not be so limited in determining exemption under Section 731.*

The Second Revenue Act of 1940, added to the Code the Excess Profits Tax Act of 1940, and Section 731 therein contained the first use of the term "engaged in mining of (listed strategic materials)."

There was in that act no relief measure for non-strategic mineral producers, comparable to Section 735 which was added later, as will hereafter be noted.

Under this Act, the Treasury issued a ruling (I.T. 3482, copied in the Appendix, p. 22) as to the meaning of Section 731, determining that the test to determine whether income is attributable to mining will be that followed to determine "gross income from the property" as defined in Section 19.23(m)-(1) (f) of Regulations 103. In other words, "under such circumstances as would entitle the producer of such natural resources to a depletion allowance with respect thereto."

"Section 731. Corporations Engaged in Mining of Strategic Metals.

"In the case of any domestic corporation engaged in the mining of tungsten, quicksilver, manganese, platinum, antimony, chromite, or tin, the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income."

This test was incorporated in the statute by the later enactment of Section 114(b) (4) (B), February 25, 1944 (Appendix, p. 19).

In the meantime, the 1940 enactment of Section 731 had been made inapplicable to years beginning after December 31, 1940 (Revenue Act of 1941, September 20, 1941, c. 412, Title II, Section 204), and when on October 21, 1942, it was re-enacted, the Congress added Section 735 (Appendix, p. 21).

Thus, in 1942, by these two sections the Congress provided relief from the excess profits tax with reference to production of certain minerals, strategic minerals in Section 731, and non-strategic minerals in Section 735.

The late Senator Walter F. George referred to the motivation for strategic minerals in this language:

“The World War II excess-profits-tax law provided an exemption for income from the mining of certain specific strategic minerals. These were minerals which were essential to the military effort and were not normally produced in quantity in the United States.”

As to the producers of other minerals, Senator George also summarized the theory behind the legislation, saying:

“... applying the principles of the World War II excess-profits tax. The old law provided that, where output exceeded normal output, a certain portion of the income from the increased output would be exempt. This provision applied to

certain mining, timber, and natural-gas properties, and it gave recognition to the fact that these types of properties are wasting assets, so that their excessive depletion during the period of an excess-profits tax would, in some cases, result in an unfair tax burden.”

In *Commissioner vs. Gifford-Hill & Co.* (C.A. 5, 1950) 180 F. (2d) 655, there is judicial recognition that the exemption in Section 735 was to stimulate production of sand and gravel, along with other minerals, to aid in the prosecution of the war.

This Court has said that the word “mining” as used in Section 731 is limited to “extraction of ore from the earth.” *Commissioner vs. Oregon Chrome Mines*, 192 F. (2d) 783, 785.

But Congress, it is submitted, did not use the generic term in this limited sense, for two reasons:

First, if Congress had intended the phrase “engaged in mining” to be limited to the meaning of “extraction of ore from the earth” it could have said so, because in Section 735, (enacted the same day) it used the more limited term. “The term ‘producer’,” states Section 735 (a) (1), “means a corporation which *extracts* minerals from a mineral property.” (Emphasis added.)

Second, when the 1942 Revenue Act was enacted, Congress had before it the record of an administrative interpretation (I.T. 3482) which defined broadly the limits of the exemption statute to include income as attributable to mining that which derives

from ordinary treatment processes as set forth in the statute and regulations applicable to the Income Tax law. The significance of this broadening as reflected in the legislative codification thereof as Section 114 (b) (4) (B) was recognized in the majority opinion of the Tax Court in *Oregon Chrome*, in this language:

“It is possible that Congress intended that the broad definition of ‘mining’ set forth in Section 114(b) (4) (B) should serve not only to determine income attributable to mining within Section 731, but also that this definition should furnish a guide post for determining whether a corporation was ‘engaged in mining’ under the same section.”

But neither this Court, nor the Tax Court, made reference to the fact that I.T. 3482 had been issued prior to the 1942 enactment of Section 731. The Tax Court did not go as far as this Court, and particularly did not specify that the term “engaged in mining” was limited to “extraction.” It is submitted that in the light of the contemporaneous use of that precise language in Section 735, it could not have done so, and this Court should not have.

The Tax Court said that *Oregon Chrome* wasn’t engaged in mining by the usual and ordinary definition of the term. An affirmance of this holding could not be quarreled with. But to have gone farther is and was dicta, which should be corrected here.

The truly basic question presented in this case is whether the Court can conclude that Congress in the

use of the generic term “engaged in the mining of . . .” intended the term to be identical with the separately and contemporaneously defined term “producer” in Section 735.

Before proceeding to discuss the anomaly of such a conclusion, further brief note should be taken of an additional concept administratively inserted into the statute prior to its 1942 re-enactment. In I.T. 3482, it is stated, in pertinent part:

“In view of the foregoing, it is held that the exemption from the excess profits tax provided in said section 731, *supra*, applies only to the portion of the adjusted excess profits net income of a domestic corporation which is attributable to the mining (including such milling processes as section 19.23 (m)-1(f) of Regulations 103 treats as mining) of strategic metals therein enumerated *under such circumstances as would entitle the producer of such natural resources to a depletion allowance with respect thereto*. The exemption does not apply to that portion of the adjusted excess profits net income attributable to any milling processes of ore mined by others.” (Emphasis added.)

Now if the Bureau had conceived the statutory term “engaged in mining” as used when Section 731 was first enacted (when there was no concomitant section 735) to be limited to “producers” in the sense of “extractors,” the underscored portion of the above quotation is meaningless, for the question of entitle-

ment to depletion allowance was at that time a developed branch of the law, and the test of economic interest in the ore in place being determined by substance rather than form was well worked out.

We can't assume that the underscored phrase is meaningless; and to give it its usual and ordinary meaning is to have present in 1942, at the time of re-enactment, an administrative interpretation the Congress is held to be aware of.

In this case the Petitioner has been allowed the depletion allowance.

This Court has the duty, we believe, to review the legislative intent evidenced in the phrase "engaged in mining."

Oregon Chrome Mines, Inc. vs. Commissioner applies an improper and erroneous test to determine exemption and the rule stated ought to be corrected now.

(b) *Congress could not have intended to apply harsher exemption rules to strategic mineral production than it did to non-strategic mineral production.*

Deductions from principles of statutory construction pale beside the compulsion of common-sense logic. Congress in 1942 spelled out, in the case of non-strategic minerals, the entitlement of "lessors" to the exemption benefits of Section 735. "The term 'lessor'," it said, "means a corporation which owns an economic interest in a mineral property..." A producer is one who extracts. Under Section 711(a)

(1) (I), the producer and the lessor are treated the same with reference to excess output.

In Section 731, instead of using the specific terms "extraction" and "economic interest," the Congress used a generic term. But Section 731 is a complete exemption, Section 735 is a partial exemption. Is it possible to assume that Congress intended a more strict construction with respect to entitlement to the exemption as to strategic mineral production than it did with respect to non-strategic mineral production? Common sense won't permit such a conclusion.

It is argued in this Court's opinion that such a conclusion is aided by reference to the addition of the word "lessor" to the 1950 version of the exemption statute. The fallacy of this is demonstrated by reference to the administrative interpretations codified in Section 114(b) (4) (B), as above referred to.

Furthermore, the legislative history of the enactment of Section 450(d) of the 1950 Revenue Act is devoid of any such indication.

Subsection (d) referring to lessors was added to the reported bill as Committee Amendment No. 6 to H.R. 9827 (81st Congress, 2nd Sess.). But Representative Cooper in explaining such committee amendment (Congressional Record, Vol. 96, 81st Cong. 2nd Sess., p. 16152) says not one word about any intention to broaden the concept of entitlement by adding lessors. Mr. Cooper's remarks are set forth in the Appendix, p. 25.

Similarly, when Senator George, Chairman of the

Finance Committee, explained the bill, there is no hint of broadening the concept of entitlement and a reading of the final paragraph of his remarks (set forth in full in the Appendix, p. 27) certainly militates against any conclusion that Congress intended the Section 735 relief provisions for non-strategic minerals to be available to a wider class of mine owners than was the case for strategic minerals under Section 731.

The exemption from excess profits tax as a method of serving national policy in encouraging the discovery and exploration of needed minerals is much akin to the depletion allowance, and the anomaly of applying a more strict test of entitlement in the case of strategic than non-strategic minerals is compounded by the anomaly of applying such an artificial test at all. The Supreme Court of the United States used applicable language in *Palmer v. Bender*, 287 U.S. 551, 77 L.ed. 489 (1932) :

“The statute makes effective the legislative policy, favoring the discoverer of oil, where valuing his capital investment for purposes of depletion at the date of discovery rather than at its original cost. The benefit of it accrues to the discoverer if he operates the well as owner or lessee, or if he leases it to another. *It would be an anomaly if that policy were to be defeated and all benefit of the depletion allowance withheld because he chose to secure the return of his capital investment by stipulating for a share of the oil produced from the discovered well*

through operation by another.” (Underscoring added.)

The Supreme Court in its remand in *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25, 90 L.ed. 1062, said (7 T.C. 1156) :

“It is settled that *the same basic issue* determines *both* to whom income derived from the production of oil and gas is taxable *and to whom a deduction for depletion is allowable*. That issue is, who has a capital investment in the oil and gas in place and what is the extent of his interest.” (Underscoring added.)

The allowability of petitioner’s depletion is not in question, and the authority is derivative—but it is compelling. The generic term, “engaged in (the) mining,” used contemporaneously with specific definitions, in the light of administrative regulations referred to the economic interest test, and under circumstances where logic requires the generic term to have its full meaning, ought to be given the same tests of substance as worked out in the depletion cases, and ought to be accorded the same dignity of meaning and common sense.

Petitioner further submits that the Tax Court should have distinguished the instant case from the Oregon Chrome case in (1) the factual situation and (2) the Oregon Chrome case did not consider the depletion allowance.

In Oregon Chrome, 192 F. (2d) 783, the Court said:

“ . . . Taxpayer takes the position that the statute does not require that the corporation be engaged in mining in the year the royalties are received . . . ”

But note the factual situation as detailed by the Tax Court, 15 T.C. 389, in the same case:

“ . . . petitioner played an entirely passive role in the chrome mining industry . . . and received all of its income in the form of royalties . . . petitioner had performed no function nor taken any financial risk in exploring these mining properties for ore, developing mines, extracting chromite therefrom and marketing the same. Nor was petitioner engaged in any other mining operation during the taxable year. . . . there is no affirmative evidence that petitioner found any mineable deposit of chrome therein . . . the express terms of the lease on that date plus the small capital investment by petitioner refute any conclusion that it completed the exploration and development work there . . . no further steps were taken toward active participation there or elsewhere subsequent to April 14, 1942. Such activity was a mere isolated occurrence . . . ”

Each and every point stressed by the Tax Court in the Oregon Chrome case is refuted here. The factual situations between the two cases are diametrically opposed. The decision as applied to the

Oregon Chrome case cannot be either legally or logically applied to this case.

Petitioner herein has been allowed depletion allowance and comes squarely within the administrative interpretation contained in I.T. 3482 set forth above. The only reference to depletion in the Oregon Chrome case appears in the opinion of the Tax Court, 15 T.C. 389:

“Petitioner has withdrawn its claim that in both 1944 and 1945 it was entitled to the use of cost depletion rather than percentage depletion . . .

As a result of these concessions the sole remaining issue is whether all or any part of the petitioner’s adjusted excess profits . . . was exempt . . .”

The question of depletion allowance as being considered by administrative interpretation as a test in determining the excess profits tax exemption, does not appear to have been urged or considered by either court in Oregon Chrome.

Respectfully submitted,

JOHN A. CARVER, JR.
Continental Bank Building,
Boise, Idaho

DALE CLEMONS,
Idaho Building,
Boise, Idaho,

Attorneys for Appellant.

APPENDIX

Section 114(b) (4) (B):

“(B) Definition of gross income from property. As used in this paragraph the term ‘gross income from the property’ means the gross income from mining. The term ‘mining,’ as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term ‘ordinary treatment processes,’ as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of crude mineral products—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combi-

nation of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this sub-paragraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 731 and 735.”

Section 114(b) (4) (B), (Act of February 25, 1944, c. 63, §124(c), 58 Stat. 21; 26 USCA Internal Revenue Acts Beginning 1940, p. 451)

§735. Nontaxable income from certain mining and timber operations, and from natural gas properties.

(a) Definitions. For the purposes of this section, section 711 (a) (1) (I), and Section 711 (a) (2) (K)—

(1) Producer; lessor; natural gas company. The term “producer” means a corporation which extracts minerals from a mineral property, or which cuts logs from a timber block, in which an economic interest is owned by such corporation. The term “lessor” means a corporation which owns an economic interest in a mineral property or a timber block, and is paid in accordance with the number of mineral units or timber units recovered therefrom by the person to which such property or block is leased. The term “natural gas company” means a corporation engaged in the withdrawal, or transportation by pipe line, of natural gas.

Section 735 IRC (Act of October 21, 1942, c. 619, Title II, §209 (c), 56 Stat. 905; amended Act of October 26, 1943, c. 279, §1, 57 Stat. 575; and amended Act of February 25, 1944, c. 63, Title II, §208 (a-c), 58 Stat. 55-57; 26 USCA Excess Profits Taxes, p. 211.

Regulations 109, Section 30-731-1: 1941-24-10743
Corporations which mine strategic metals I.T. 3482

INTERNAL REVENUE CODE

The exemption from excess profits tax under section 731 of the Excess Profits Tax Act of 1940 in the case of a domestic corporate taxpayer engaged in the mining of strategic metals applies to that portion of the adjusted excess profits net income attributable to mining and to such milling processes as are treated as a part of mining for depletion purposes under section 19.23(m)-1(f) of Regulations 193, but does not apply to such income attributable to any milling processes of the taxpayer with respect to ore mined by others.

Advice is requested whether the M Company is exempt from the Federal excess profits tax on the adjusted excess profits net income attributable to the operation of a plant constructed by it for the milling of tungsten mined from its own property and also for the milling of tungsten mined by others from properties in that locality which could not be worked unless a mill was available.

Section 731 of the Excess Profits Tax Act of 1940 (Subchapter E of Chapter 2 of the Internal Revenue Code, as added by the Second Revenue Act of 1940), provides as follows:

Corporations Engaged in Mining of Strategic Metals.

In the case of any domestic corporation en-

gaged in the mining of tungsten, quicksilver, manganese, platinum, antimony, chromite, or tin, *the portion of the adjusted excess profits net income attributable to such mining* in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income. (Italics supplied.)

In connection with the phrase which is emphasized in the above quotation, attention is directed to section 30.731-1 of Regulations 109, which reads in part as follows:

(b) . . . The portion of the excess profits net income attributable to such mining is the gross income derived from strategic metals arising out of operations which give rise to "gross income from the property," as defined in section 19.23(m)-(1) (f) of Regulations 103 . . . (less certain items not material here).

In view of the foregoing, it is held that the exemption from the excess profits tax provided in said section 731, *supra*, applies only to the portion of the adjusted excess profits net income of a domestic corporation which is attributable to the mining (including such milling processes as section 19.23(m)-1(f) of Regulations 103 treats as mining) of stra-

tegic metals therein enumerated under such circumstances as would entitle the producer to such natural resources to a depletion allowance with respect thereto. The exemption does not apply to that portion of the adjusted excess profits net income attributable to any milling processes of ore mined by others.

I.T. 3482, CB 1941, p. 288.

Explanation of Committee Amendment No. 6 by Mr. Cooper (Section 450, IRC) :

“Committee amendment No. 6: This amendment deals with the exemption from the excess-profits tax of income attributable to the mining of strategic and critical minerals. Under the World War II excess-profits-tax law, income derived from the mining of strategic minerals was exempt from the tax. The bill as reported contained the provisions of the old law. This amendment adds other minerals to the list of strategic minerals which your committee believes to be in the category of strategic minerals. The amendment extends the same treatment to minerals not specifically named in the bill upon certification by the Defense Minerals Administration as being strategic or critical minerals. In the case of critical minerals, however, the certification applies only in respect of mining from—

“(i) a mineral property which was developed and brought into production subsequent to June 25, 1950; or

“(ii) a mineral property which has been in production prior to June 25, 1950, but was not in production on such date; or

“(iii) a mineral property from which, during the period it was in production during 1946, 1947, 1948, and 1949, the aggregate gross income derived therefrom was less than the aggregate of the deductions (allowable under Section 23, without regard to any

net operating loss deduction) attributable to such property during such period of production.”

96 Congressional Record, Part 12, 81st Cong. 2nd Sess. p. 16152, December 5, 1950, Remarks of Representative Cooper.

Explanation of Senate Finance Committee Chairman, Mr. George (Section 450 IRC) :

“The World War II excess-profits-tax law provided an exemption for income from the mining of certain specific strategic minerals. These were minerals which were essential to the military effort and were not normally produced in quantity in the United States. The House bill provided an exemption for these same minerals and included a number of additional strategic minerals. The new minerals were added to the strategic list after consultation with the National Security Resources Board. Your committee has added molybdenum to the strategic list because of its vital importance to our defense effort.

“In order to keep the list of strategic minerals current with defense demands, the House bill provided for the certification of additional strategic minerals by the agency created to carry out section 303(a) of the Defense Production Act of 1950. Your committee has retained this provision in the bill, but has amended the bill to strike out a provision which gave this agency the authority to certify minerals which are not so strategic as they are critical. Under the House Bill, income from mining these critical minerals would be entirely exempt from excess-profits tax where it was obtained from the operation of new mines, or mines which were closed down at the time of the Korean invasion, or mines which operated at an over-all loss during 1946, 1947, 1948 and 1949. Your committee believed that this pro-

vision was too broad and would result in exemption of income in many cases where such an exemption was not necessary. It was felt that increased output of minerals which were not strategic but were merely critical could be encouraged through subsidies or bonus payments more effectively and at less cost than through excess-profits-tax exemption.

“It was felt by your committee that, except for the special case of the strategic minerals, fair treatment of mineral producers under the excess-profits tax could be achieved by applying the principles of the World War II excess-profits tax. The old law provided that, where output exceeded normal output, a certain portion of the income from the increased output would be exempt. This provision applied to certain mining, timber, and natural-gas properties, and it gave recognition to the fact that these types of properties are wasting assets, so that their excessive depletion during the period of an excess-profits tax would, in some cases, result in an unfair tax burden.”

96 Congressional Record Part 12, 81st Cong.
2nd Sess. p. 16771-16772, December 20, 1950,
Remarks of Senator George.

No. 15528

United States
Court of Appeals
for the Ninth Circuit

UNITED MERCURY MINES COMPANY, a Corporation,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

JUL 15 1957

PAUL P. O'BRIEN, CLERK

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Petition to Review a Decision of the Tax Court
of the United States

NAMES AND ADDRESSES OF ATTORNEYS

JOHN A. CARVER, JR.,

Cont. Bank Building,

Boise, Idaho;

DALE CLEMONS,

Idaho Building,

Boise, Idaho,

For the Petitioner.

CHARLES K. RICE,

Assistant U. S. Attorney General,

Tax Division, Dept. of Justice,

Washington 25, D. C.;

NELSON P. ROSE,

Chief Counsel, Internal Revenue Service,

Washington 25, D. C.,

For the Respondent.

1956

- May 2—Hearing had before Judge LeMire on merits. Stipulation of facts filed at hearing. Appearance of Dale Clemons, as counsel, filed at hearing. Petitioner's brief 7/2/56. Respondent's brief 8/16/56. Petitioner's reply 9/5/56.
- May 29—Transcript of hearing 4/30/56, 5/2/56, filed.
- July 2—Brief filed by petitioner. 7/2/56, served.
- Aug. 14—Motion for extension of time to 10/1/56, to file brief, filed by respondent. 8/16/56, granted. 8/20/56, served.
- Sept. 25—Motion for extension of time to 10/22/56, to file brief, filed by respondent. 9/26/56, granted. 9/27/56, served.
- Oct. 22—Respondent's brief in answer, filed. 10/23/56, served.
- Nov. 2—Motion to extend time to 12/3/56, to file reply brief, filed by petitioner. 11/2/56, granted. 11/5/56, served.
- Dec. 3—Reply brief filed by petitioner. 12/3/56, served.
- Dec. 26—Memorandum findings of fact and opinion filed, LeMire J. Decision will be entered for respondent. 12/26/56, served.
- Dec. 26—Decision entered, Judge LeMire. 12/28/56, served.

1956

Mar. 22—Petition for review by United States Court of Appeals, Ninth Circuit, filed by petitioner.

Mar. 22—Certificate of service filed by petitioner.

Apr. 9—Designation of contents of record filed by petitioner.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the Notice of Deficiency (Ap:P:AA:HH90:DMK) dated February 1, 1955, and as a basis of its proceedings alleges as follows:

I.

Petitioner is a corporation duly organized under the laws of the State of Idaho with its principal place of business at P. O. Box 448, Boise, Idaho. The return for the period here involved, being the calendar year 1944, was duly filed on the 9th day of March, 1945, with the Collector of Internal Revenue for the District of Idaho.

II.

The Notice of Deficiency, copy of which is attached and marked Exhibit "A," was mailed to petitioner on February 1, 1955.

III.

The taxes in controversy are excess profits tax for the calendar year 1944 in the amount of \$113,453.68, and income tax for the calendar year 1944 (over-assessment) in the amount of \$57,071.69. Tax liability for the calendar year 1945 is computed in the Notice of Deficiency, but involves no controversy.

IV.

The determination of tax set forth in said Notice of Deficiency is based upon the following error:

The Commissioner erred in denying to taxpayer the exemption from excess profits tax provided in Section 731 of the Internal Revenue Code of 1939, as amended.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The taxpayer was engaged in mining, for the production of the income as to which excess profits tax liability is asserted, during the year 1944.

(b) The revenue, the subject of the deficiency assessment, was derived from the production of strategic minerals, to wit, antimony and tungsten, from certain mining properties in Valley County, Idaho.

(c) These mining properties were located under the mining laws of the United States and the State of Idaho or acquired by purchase by J. J. Oberbillig and by him transferred to the petitioner, or predecessor corporations, which in turn transferred

them to petitioner. By 1921, Mr. Oberbillig had title or option on the key or controlling properties for all of the field upon which the production here in question occurred.

(d) From the dates of location to the years in question, and subsequently to the present date, petitioner has (with specific reference to the properties from which the 1944 production was obtained, and related properties):

1. Maintained continuing activities for the discovery and blocking out of ore reserves;

2. Performed exploration work and secured its performance, including shafts, tunnels, drifts, and drilling;

3. Developed and assisted in the development of the properties, including road and building construction and mine construction, and assistance in transmission line construction, road maintenance, clearing, and the like;

4. At various times, extracted, and sold or stock-piled strategic minerals.

(e) From 1927 to 1941, there were a series of contracts between petitioner and Bradley Mining Company, or its predecessors. The contract in effect in 1944 was executed December 31, 1941. Under each of the contracts, and particularly in the contract of December 31, 1941, the petitioner maintained an economic interest in the ore in place.

(f) Petitioner performed developmental work subsequent to December 31, 1941, on properties described in that agreement, including

1. Road building, power line building, and discovery and blocking out of ores, on properties already conveyed; and

2. General developmental work on properties upon which Bradley had an option and which were transferred without additional consideration in 1943;

3. Further general development and crosscutting work on properties subject to option which were transferred in 1947. This work was done in 1944.

(g) Petitioner, by the beginning of 1944, had a capital commitment in discovery, exploration and development work in these properties exceeding \$400,000.00.

(h) Petitioner, during 1944 and 1945, and for many years prior and subsequent thereto, has been a producing company operating other properties for the production of strategic minerals in the same general location as those above referred to.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that the deficiency assessment is without authority of law, and grant such other and further relief as to the Court shall seem meet and proper.

/s/ JOHN A. CARVER, JR.,
Attorney for Petitioner.

State of Idaho,
County of Ada—ss.

J. J. Oberbillig, being duly sworn, says that he is the president of United Mercury Mines Company, a

corporation, petitioner above named, and as such president he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ J. J. OBERBILLIG.

Subscribed and sworn to before me this 21st day of April, 1955.

[Seal] /s/ JOHN A. CARVER, JR.,
Notary Public for Idaho.

Form 1231 (App)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner

P. O. Box 3935
Portland 8, Oregon

In replying
refer to:

Ap:P:AA:HH
90D:IMK

United Mercury Mines Co.,
P. O. Box 448,
Boise, Idaho.

Gentlemen:

You are advised that the determination of your excess profits tax liability for the taxable year

ended December 31, 1944, discloses a deficiency of \$113,453.68 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellant, P. O. Box 3935, Portland 8, Oregon. The signing and filing of this form will expedite the closing of your case by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner.

By A. N. WILLIAMS,
Associate Chief, Appellate
Division.

Enclosures:

Statement
Form 1276
Agreement Form

Statement

United Mercury Mines Co.
P. O. Box 448
Boise, Idaho

Tax liability for the taxable years ended December 31, 1944,
and December 31, 1945.

| Year | Income Tax | Overassessment |
|-------------|------------|----------------|
| | Deficiency | |
| 1944..... | None | (\$57,071.69) |
| 1945..... | None | None |
| Total | None | (\$57,071.69) |

| Declared Value Excess-Profits Tax | | |
|-----------------------------------|------|------|
| 1944..... | None | None |
| 1945..... | None | None |

| Excess-Profits Tax | | |
|--------------------|--------------|------|
| 1944..... | \$113,453.68 | None |
| 1945..... | None | None |
| Total | \$113,453.68 | None |

In making this determination of your tax liability, careful consideration has been given to the report of examination transmitted to you March 14, 1952, to your protest received October 10, 1952, and to the statements made by your authorized representatives in conferences August 6, 1953, January 20, 1954, and November 23, 1954.

The 80% limitation is applicable to the year 1944, the only year in which there is excess profits tax liability. Due to the effect of the 80% limitation the carryback of the 1946 unused excess profits credit does not decrease the 1944 tax liability.

The overassessment shown herein should not be regarded as finally determined. When final determination has been made, the overassessment to the extent of the amount allowable will be made the subject of a certificate of overassessment, which will reach you in due course through the office of the District Director of Internal Revenue for your district, and will be applied by that official in accordance with Section 322(a) of the Internal Revenue Code (1939) provided that you have fully protected yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the District Director of Internal Revenue for your district a timely claim for refund on Form 843.

A copy of this letter and statement has been mailed to your representative, Mr. John A. Carver, Jr., Continental Bank Building, Boise, Idaho, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1944
Adjustments to Net Income

| | |
|---|--------------|
| Net income disclosed by return for declared value | |
| excess profits tax | \$167,781.09 |
| Additional income and unallowable deductions: | |
| (a) Antimony Ridge loss | 2,500.00 |
| | <hr/> |
| Adjusted net income for declared value excess | |
| profits tax | \$170,281.09 |
| | <hr/> <hr/> |

Explanation of Adjustments

(a) Loss claimed on the Antimony Ridge operation is decreased in the amount of \$2,500.00 to disallow construction of road for Idaho Power Company lines. It is held that the amount paid was in the nature of a capital expenditure and therefore unallowable.

Computation of Tax—1944

Declared Value Excess Profits Tax Computation

| | | |
|---|--------------|--------------|
| 1. Net income for declared value excess profits tax computation..... | | \$170,281.09 |
| 2. Less: 10% of \$2,500,000.00 value of capital stock as declared for year ended June 30, 1944..... | \$250,000.00 | |
| Dividends received credit..... | None | 250,000.00 |
| 3. Net income subject to declared value excess profits tax (carried forward) | | None |
| 5. Declared value excess profits tax due | | None |
| 6. Previously assessed | | None |
| 7. Deficiency/overassessment in declared value excess profits tax..... | | None |

Normal Tax Computation
(Alternative Method)

| | |
|--|--------------|
| 1. Net income | \$171,872.93 |
| 2. Less: excess of net long-term capital gain over net short-term capital loss | 1,591.84 |
| 3. Adjusted net income | \$170,281.09 |
| 6. Less: income subject to excess profits tax | 137,185.35 |
| 8. Normal tax net income | \$ 33,095.74 |
| \$ 5,000.00 @ 15%..... | \$ 750.00 |
| 15,000.00 @ 17%..... | 2,550.00 |
| 5,000.00 @ 19%..... | 950.00 |
| 8,095.74 @ 31%..... | 2,509.68 |
| 14. Total normal tax | \$ 6,759.68 |

Surtax Computation

| | |
|--|----------------------|
| 17. Adjusted net income | \$170,281.09 |
| 18. Less: income subject to excess profit tax | 137,185.35 |
| 21. Adjusted surtax net income..... | <u>\$ 33,095.74</u> |
| \$25,000.00 @ 10%..... | \$ 2,500.00 |
| 8,095.74 @ 22%..... | 1,781.06 |
| | <u>\$ 4,281.06</u> |
| 27. Partial tax (Line 14, plus Line 21) | \$ 11,040.74 |
| 28. 25% of Line 2..... | 397.96 |
| Total tax liability..... | <u>\$ 11,438.70</u> |
| Previously assessed: | |
| Account No. Apr. 410004—Idaho.. | \$67,510.40 |
| Account No. May 520600—Idaho.. | 999.99 |
| | <u>68,510.39</u> |
| Overassessment in income tax | <u>(\$57,071.69)</u> |

Taxable Year Ended December 31, 1944
Adjustment to Excess Profits Net Income

| | |
|---|---------------------|
| Excess profits net income disclosed by return (none filed) | None |
| Additional income and unallowable deductions: | |
| (a) Royalty income | \$190,243.19 |
| (b) Antimony Ridge loss (decreased) | 2,500.00 |
| Total | <u>\$192,743.19</u> |
| Less: allowable deductions per return | 22,462.10 |
| Excess profits net income | <u>\$170,281.09</u> |

Explanation of Adjustments

(a) In your income and declared value excess-profits tax returns, Form 1120, for the years 1944 and 1945, you reported

incomes and losses from the "Stibnite," "Bonanza" and "Antimony Ridge" properties as follows:

| | 1944 | 1945 |
|----------------------|---------------------|--------------------|
| Stibnite | \$219,439.42 | \$74,247.37 |
| Bonanza | (14,160.36) | (34,583.10) |
| Antimony Ridge | (15,035.87) | (8,499.26) |
| Total | <u>\$190,243.19</u> | <u>\$31,165.01</u> |

You did not file a corporation excess profits tax return, Form 1121, for either of the years 1944 or 1945, and the sums shown above were not reported for excess profits tax purposes for either of such years.

It has been determined that you were not engaged in mining strategic minerals from the Stibnite property during either of the taxable years 1944 or 1945, within the meaning of Section 731 of the Internal Revenue Code of 1939, as amended; and that, therefore, the income realized by you from the Stibnite property during those years is not exempt from taxation under the provisions of Subchapter E of the Internal Revenue Code of 1939, as amended.

(b) Reference explanation of adjustment to income tax net income above.

Excess Profits Tax Computation—1944

| | |
|--|---------------------|
| 1. Excess profits net income..... | \$170,281.09 |
| 2. Specific exemption | \$ 10,000.00 |
| 4. Excess profits credit based on invested capital | 23,095.74 |
| 5. Total credit | <u>33,095.74</u> |
| 8. Adjusted excess profits net income | <u>\$137,185.35</u> |
| 9. 95% of adjusted excess profits net income | <u>\$130,326.08</u> |
| 10. Net income | \$171,872.93 |
| 11. Less: Dividends received credit..... | <u>None</u> |

Excess Profits Tax Computation—1944—(Cont.)

| | |
|---|--------------|
| 12. Surtax net income | \$171,872.93 |
| 13. 80% of item 12..... | 137,498.34 |
| 14. Income tax under Chapter 1..... | 11,438.70 |
| | <hr/> |
| 15. Excess of Line 13 over item 14..... | \$126,059.64 |
| 16. Item 9 or item 15, whichever is lesser | 126,059.64 |
| 21. Less: Post War Credit (10% of item 16) | 12,605.96 |
| | <hr/> |
| 24. Excess profit tax due | \$113,453.68 |
| Previously assessed | None |
| | <hr/> |
| Deficiency in excess profits tax..... | \$113,453.68 |
| | <hr/> <hr/> |

| Excess Profits Credits—Based on Invested Capital | | |
|---|--------------|--------------|
| | 1944 | 1945 |
| Money or property paid in for stock— | | |
| Par value of capital stock | \$500,000.00 | \$500,000.00 |
| Unissued capital stock | \$ 42,870.60 | \$ 42,870.60 |
| Discount on stock | 158,803.70 | 158,803.70 |
| Distribution not out of earnings of profits | 211,303.20 | 317,592.40 |
| Net money or property paid in for stock | \$288,696.80 | \$182,407.60 |
| Accumulated earnings & profits | None | None |
| Equity invested capital at beginning of taxable year..... | \$288,696.80 | \$182,407.60 |
| Adjustments | None | None |
| Invested capital | \$288,696.80 | \$182,407.60 |
| Excess profits credit—8% of invested capital..... | \$ 23,095.74 | \$ 14,592.61 |

Taxable Year Ended December 31, 1945

Adjustments to Net Income

| | |
|-------------------------------------|--------------|
| Net income disclosed by return..... | \$ 20,968.44 |
| As adjusted | \$ 20,968.44 |
| <hr/> | |
| Net adjustment | None |

Explanation of Adjustments

No adjustment has been made to net income as shown by return filed.

Computation of Tax—1945

Declared Value Excess Profits Tax Computation

| | |
|---|------|
| Net income subject to declared value excess profits tax (same as return).... | None |
| <hr/> | |
| Declared value excess profits tax due.... | None |
| Previously assessed | None |
| <hr/> | |
| Deficiency/overassessment in declared value excess profits tax | None |
| <hr/> | |

Normal Tax and Surtax Computation

| | |
|---|--------------|
| Net income (same as return) | \$ 20,968.44 |
| <hr/> | |
| Normal tax (same as return) | 3,484.00 |
| Surtax (same as return) | 2,096.84 |
| <hr/> | |
| Income tax liability (same as return).. | \$ 5,580.84 |
| Previously assessed, Account No. Apr. 410002—Idaho | 5,580.84 |
| <hr/> | |
| Deficiency/overassessment in income tax | None |
| <hr/> | |

Taxable Year Ended December 31, 1945

Adjustment to Excess Profits Net Income

| | | |
|---|--------------|--------------|
| Excess profits net income disclosed by return (none filed) | | None |
| <hr/> | | |
| Additional income and unallowable deductions: | | |
| (a) Royalty income | \$ 31,165.01 | |
| Less: Allowable deductions per return | 10,196.57 | \$ 20,968.44 |
| | <hr/> | <hr/> |
| Excess profits net income..... | | \$ 20,968.44 |
| | | <hr/> <hr/> |

Taxable Year Ended December 31, 1945

Explanation of Adjustments

(a) Reference paragraph (a) of explanation of adjustments for excess profits net income for year 1944 above.

Excess Profits Tax Computation—1945

| | | |
|---|--------------|--------------|
| 1. Excess profits net income..... | | \$ 20,968.44 |
| 2. Specific exemption | \$ 10,000.00 | |
| 3. Excess profits credit based on in- vested capital | 14,592.61 | 24,592.61 |
| | <hr/> | <hr/> |
| 8. Adjusted excess profits net income | | None |
| <hr/> | | |
| 24. Excess profits tax due..... | | None |
| Previously assessed | | None |
| Deficiency/overassessment in excess profits tax | | None |
| | | <hr/> <hr/> |

[Endorsed]: Filed April 25, 1955.

[Title of Tax Court and Cause.]

AMENDMENT TO PETITION

Now Comes the petitioner above named and submits by way of amendment to his Petition on file herein an additional verification as follows:

State of Idaho,
County of Ada—ss.

J. J. Oberbillig, being duly sworn, says that he is the president of United Mercury Mines Company, a Corporation, petitioner above named, and as such president he is duly authorized to verify the petition filed in the Tax Court of the United States with reference to the above-entitled action; that as such president of United Mercury Mines Company, a Corporation, he verified the original petition dated April 21, 1955, and is familiar with its contents and now again swears that they are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ J. J. OBERBILLIG.

Subscribed and sworn to before me this 3rd day of May, 1955.

[Seal] /s/ ROBERT T. MILLER,
Notary Public for Idaho.

[Endorsed]: Filed May 5, 1955.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in the first sentence of paragraph I of the petition, as amended. Denies the remaining allegations contained in said paragraph. Alleges that petitioner did not file an excess profits tax return for the taxable year 1944; and further, that its corporation income and declared value excess-profits tax return for said taxable year was filed on April 18, 1945.

2. Admits the allegations contained in paragraph II of the petition, as amended.

3. Admits the allegations contained in paragraph III of the petition, as amended, except that it is denied that the overassessment of income tax for the taxable year 1944, as shown by the notice of deficiency, is in controversy in this proceeding.

4. Denies that he erred in his determination of the deficiency in excess profits tax as shown in the notice of deficiency from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition, as amended.

5. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V (a) to (h), inclusive, of the petition, as amended.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of the deficiency be approved.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Of Counsel:

MELVIN L. SEARS,
Regional Counsel;

JOHN H. PIGG,
Attorney, Internal Revenue
Service.

[Endorsed]: Filed June 7, 1955.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties above named, appearing and acting by and through their respective counsel of record, as follows:

1. Petitioner is a corporation, organized January 20, 1921, under the laws of the State of Idaho. Its authorized capital is \$500,000, divided into five million shares of common stock at a par value of ten cents each. All of the stock is issued and outstanding. Petitioner has 475 stockholders, and its largest stockholder, its president and founder, J. J. Ober-

billig, owns slightly less than 10 per cent of the stock.

2. Under its Articles of Incorporation, petitioner is authorized generally to engage in the mining business, as follows:

To purchase, acquire, hold, own, sell, trade, lease, rent, locate and otherwise secure, handle and dispose of mines, mining properties, mining locations, ores, mineral deposits, timber and water rights;

To manage, develop, operate, work and equip mines, mining properties, lodes and deposits, and to mill, reduce, treat, and handle ores, and sell and dispose of produce derived from same;

To buy, acquire, own, sell, mortgage, and otherwise secure, handle, and dispose of such personal property and real estate, as the said corporation may deem necessary, desirable or expedient for its use in the transaction of its business;

To construct buildings and other structures, on real estate, owned, leased, located, or otherwise procured by said corporation and otherwise the same;

To borrow money in the name of said corporation, to mortgage, pledge, or hypothecate in any manner, any or all of the property of said corporation, either real, personal, or mixed, to secure the payment of the same; and in general;

To conduct a general mining business, and to buy, own, manage, and operate mines and mining claims, and to do all things needful incident thereto.

3. Petitioner's federal tax returns for the years 1944 and 1945 were filed with the then Collector of

Internal Revenue for the District of Idaho. Petitioner filed no excess profits tax returns for 1944 and 1945. Attached hereto as Exhibits 1-A and 2-B are photostat copies of the corporation income and declared value excess-profits tax returns of the petitioner for the years 1944 and 1945.

4. At all times since its organization in 1921, petitioner has been engaged in the mining business in Idaho in an area known as the Yellow Pine Mining District, Valley County, Idaho. This district is approximately eighty miles from the nearest rail head at Cascade, Idaho. In general the mineral properties belonging to petitioner in 1941, some of which were subject to options dating back to 1927, involved approximately seven hundred mining claims comprising approximately 14,000 acres. These properties included the following:

(a) The Stibnite Property. This consisted primarily of two groups of mining claims, the first known as the Meadow Creek group, and the second known as the Hennessey group or East Fork group. The Hennessey group contained large deposits of Tungsten ore.

(b) The Midnight Group. This consisted of mining claims located near the Stibnite property.

(c) Smokey Ridge Group. This consisted of mining claims located near the Stibnite property.

(d) Antimony Ridge Group. This consisted of quicksilver, gold and antimony mining claims lying northwest of the Stibnite property.

(e) Cinnabar Group. This consisted of quick-

silver mining claims lying east of the Stibnite property.

Attached hereto as Exhibit 3-C is a sketch showing the relative location of the mining properties belonging to the petitioner in 1941.

5. On December 31, 1941, petitioner transferred its Stibnite properties to Bradley Mining Company pursuant to contract executed on that date. This contract, attached as Exhibit 4-D, was in force in the taxable year 1944. The nature and interpretation of the contract was involved in an opinion promulgated February 8, 1956, by the Court of Appeals for the Ninth Circuit, in the case of *United Mercury Mines Co. vs. Bradley Mining Co.* This opinion, copy of which is attached as Exhibit 5-E, is to be considered part of the record of this proceeding.

6. The contract executed December 31, 1941, related to the Stibnite properties described in paragraph 4(a) above, with a separate option therein covering the Midnight group described in paragraph 4(b) above. During 1944 and 1945, Bradley Mining Company, hereafter also referred to as "Bradley," operated the properties described in paragraph 4(a) above. Bradley built mine buildings, installed the power generating equipment, concentration plant, and other buildings. Bradley owned the equipment, machinery and other personal property located at the mine. Bradley operated and worked the Stibnite properties and extracted, transported, marketed, and sold the ore, and received the payments from

purchasers. At no time before or after the 1941 contract did petitioner ever engage in the removal of ore for sale from the Stibnite properties and the Midnight group described in paragraph 4(b) above.

7. Under the contract of December 31, 1941, an option was given to Bradley to acquire the Midnight group of mining claims. This option was exercised on October 8, 1943, and the claims transferred to Bradley.

8. Petitioner was engaged in mining the Cinnabar property for quicksilver in 1944 and 1945. In 1941 petitioner deeded a 55% interest in the Cinnabar to Bonanza Mines, Inc. The Cinnabar had not been worked prior to the transfer to Bonanza. Thereafter a reduction plant was built and the property operated as a joint venture by Bonanza and petitioner. The mining operations resulted in the following incomes and losses during the period from 1942 to 1945, inclusive:

| Year | Income or (Loss) |
|------------|------------------|
| 1942 | \$ 40,488.79 |
| 1943 | 89,325.50 |
| 1944 | (14,160.36) |
| 1945 | (34,583.10) |

9. Petitioner also worked the Antimony Ridge property for antimony in 1944 and 1945. This mining operation resulted in losses during the period from 1941 to 1944, inclusive, and in 1947 this property was transferred to Bradley. The gross incomes

and resulting losses from these operations were as follows:

| Year | Gross Income From Sales | (Loss) |
|------|-------------------------|---------------|
| 1941 | \$27,403.84 | (\$16,323.05) |
| 1942 | 19,583.33 | (32,651.92) |
| 1943 | 2,800.00 | (15,035.87) |
| 1944 | 6,0000.00 | (8,499.26) |

10. All the exhibits herein mentioned shall be considered as having been offered and received in evidence in this case unless objection is made thereto and the objection is sustained.

11. Each of the parties hereto reserves the right to supplement the facts herein set forth with evidence at the trial, and particularly to amplify paragraph 6 above.

/s/ JOHN A. CARVER, JR.,

Counsel for Petitioner;

/s/ JOHN POTTS BARNES,

Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: Filed May 2, 1956.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves a deficiency in excess profits tax of petitioner for the year 1944 in the amount of \$113,453.68.

The sole issue presented is whether petitioner is

exempt from excess profits tax on income it received in 1944 under a "Conveyance, Royalty Agreement, and Option," dated December 31, 1941, by virtue of the provisions of section 731 of the Internal Revenue Code of 1939.

Findings of Fact

The stipulated facts are found accordingly.

Petitioner is an Idaho corporation organized in 1921. Its authorized capital is \$500,000, consisting of five million shares of the par value of 10 cents per share, all of which is issued and outstanding.

Petitioner filed its federal income and declared value excess profits tax return for the year 1944 with the collector of internal revenue for the district of Idaho. It did not file an excess profits tax return for that year.

By its charter petitioner is authorized generally to engage in the mining business, to acquire, hold, manage, develop, operate, and work mining properties, together with the usual incidental powers.

Since its incorporation petitioner has been so engaged in an area known as the Yellow Pine Mining District, Valley County, Idaho.

In general, the mineral properties belonging to petitioner in 1941 consisted of approximately 700 mining claims covering about 14,000 acres. These properties may be designated as follows:

1. The Stibnite Property. This consisted primarily of two groups of mining claims, the first known as the Meadow Creek group, and the second known as the Hennessy group or East Fork group.

The Hennessy group contained large deposits of Tungsten ore.

2. The Midnight Group. This consisted of mining claims located near the Stibnite property.

3. Smokey Ridge Group. This consisted of mining claims located near the Stibnite property.

4. Antimony Ridge Group. This consisted of quicksilver, gold and antimony mining claims lying northwest of the Stibnite property.

5. Cinnabar Group. This consisted of quicksilver mining claims lying east of the Stibnite property.

The Bradley Mining Company, hereinafter referred to as Bradley, was organized under the laws of California for the purpose of engaging in the mining business. Bradley was a large operating concern with considerable working capital.

On August 5, 1927, petitioner negotiated an option agreement with Bradley for the development and operation of the Meadow Creek and Cinnabar claims. The agreement also granted Bradley an option to purchase petitioner's title in the mining claims for \$1,500,000. In the meantime petitioner was to receive certain royalty payments which were to be credited toward the purchase price. The agreement of August 5, 1927, did not extend to the Hennessy mining claims which were purchased outright by Bradley in 1927. After spending approximately \$30,000 on the Hennessy claims, Bradley abandoned them. Petitioner reacquired the Hennessy claims

and they were included, along with the Meadow Creek claims, in subsequent agreements executed between Bradley and petitioner in 1930 and 1939. These two groups of claims comprised the Stibnite mining properties heretofore mentioned. The acquisition of the Hennessy claims was described in the option agreement dated May 16, 1939, as follows:

And Whereas, subsequent to said agreement on October 3, 1930, the Yellow Pine Company and its successor in interest, the Bradley Mining Co., acquired a group of mining claims known as the Hennessy Group, [sic] which said group of claims was acquired with the understanding and agreement that it would become a part of the Meadow Creek Group of lode mining claims and to be owned by the United Mercury Mines Company until the acquisition of the entire Meadow Creek Group by the Yellow Pine Company;

* * *

On September 4, 1939, Bradley and petitioner executed a "Form of Agreement for Mineral Explorations" granting to the Government the right to enter upon the Stibnite property for the purpose of prospecting, drilling, and exploring for minerals. The exploratory operations were not commenced until the summer of 1941. The drilling was at Government expense and under the supervision of the Bureau of Mines, and resulted in the discovery of tungsten.

The contractual relationship which had existed

between Bradley and petitioner from 1927 to 1941 was terminated on December 31, 1941, and on the same date a new agreement designated "Conveyance, Royalty Agreement, and Option," was executed. That agreement provides in part as follows:

That the said United [petitioner] for and in consideration of the royalty hereinafter agreed to be paid by Bradley * * * has Granted, Bargained, Sold, and Assigned, and does by these presents grant, bargain, sell and assign, unto Bradley * * * all of the following described lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, consisting of two groups of lode mining claims, the first of said groups being commonly known as the Meadow Creek Group, and the second of said groups being commonly known as the Hennessy Group * * *.

Together with the personal property situate upon said mining claims;

Together with all millsites, power plants, transmission lines, dams, reservoirs, mills, dwellings, buildings, structures, water rights, tail races, tailing sites, tailing dams or easements * * * To Have and to Hold, subject to the royalty herein reserved and retained by United, all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said Bradley, its successors and assigns, forever.

* * *

For and in consideration of the premises * * * Bradley * * * does hereby covenant, promise and

agree to pay to United * * * a royalty of five per cent (5% on all net smelter returns, net revenue, and net mint returns, as defined herein * * *; the payment of said five per cent (5%) royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after Midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above-described property * * *.

* * *

It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of Bradley * * * and that the failure of Bradley to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.

Anything in this agreement contained to the contrary notwithstanding, it is the intention of the parties to this agreement that the full ownership, possession and control of all the properties above described,* * * and all of the personal property acquired and/or used on or in connection with the operation and development of the above-described properties, shall be vested in Bradley, and the United shall have no interest in fee in or to said properties, or in and to any of the personal property acquired and/or used in connection with the operation and development of said properties; * * *.

After 1941 the operations conducted by Bradley were primarily directed toward the development

and mining of tungsten from the Hennessy mine. Between 1927 and 1933 Bradley expended in excess of \$100,000 per year in development of the properties under the option agreements.

The option agreement dated May 16, 1939, provided in part as follows:

And Whereas, the party of the second party [Bradley] went into actual possession of said properties and began bona fide development work thereon upon the signing of and in accordance with the provisions of said option agreement dated August 5th, 1927, and has during each and every year thereafter expended in developing and equipping in, upon, and/or for the benefit of said properties a sum of not less than twenty-four thousand dollars (\$24,000.00);

* * *

Bradley erected mine buildings, a concentration plant, and other buildings, and installed the power generating equipment. It owned the equipment, machinery, and other personal property located at the mine. Bradley operated the Stibnite properties. It extracted, transported, marketed and sold the ore and received the payments from purchasers. At no time before or after the 1941 contract did petitioner engage in the removal of ore for sale from the Stibnite and Midnight group of properties.

The relationship between petitioner and Bradley was not always harmonious. Differences frequently arose with respect to provisions of the agreements which were amicably adjusted. However, sometime

subsequent to the taxable year petitioner instituted a suit against Bradley which involved an issue with respect to royalty computations. *United Mercury Mines vs. Bradley Mining Co.*, 233 F. 2d 205 (C.A.9).

Petitioner was engaged in mining the Cinnabar property for quicksilver in 1944 and 1945. In 1941 petitioner deeded a 55 per cent interest in the Cinnabar property to Bonanza Mines, Inc. The Cinnabar property had not been worked prior to the transfer. Thereafter a reduction plant was built and the property was operated as a joint venture by petitioner and Bonanza.

Petitioner also worked the Antimony Ridge property for antimony in 1944 and 1945. This mining operation resulted in losses during the period 1941 to 1944, inclusive. In 1947 the Antimony Ridge property was transferred to Bradley.

In its income and declared value excess profits tax return for 1944 petitioner reported the following:

Royalty income under contract

dated December 31, 1941...\$219,439.42

Income from operation of An-

timony Ridge Mine..... (14,160.36) Loss

Income from operation of Bo-

nanza mine..... (15,035.87) Loss

Total income reported...\$190,243.19

In his deficiency notice the respondent determined that petitioner was not engaged in mining strategic minerals from the Stibnite property during the year 1944 within the meaning of section 731 of the In-

ternal Revenue Code of 1939, and the income realized from the Stibnite property during 1944 is not exempt from taxation under the provisions of Subchapter E of the Internal Revenue Code of 1939, as amended.

Petitioner was not engaged in the mining of tungsten during the taxable year 1944 within the purview of section 731 of the Internal Revenue Code of 1939.

Opinion

LeMire, Judge:

The question presented is whether petitioner was engaged in the mining of tungsten within the meaning of section 731 of the Internal Revenue Code of 1931¹ during the taxable year 1944, so that its adjusted excess profits net income was exempt from the excess profits tax. The respondent determined that petitioner was not so engaged. Petitioner filed no excess profits tax return for that year. The respondent determined that petitioner was not exempt from excess profits tax, and included the royalty income received by petitioner from Bradley Mining

¹Sec. 731. Corporations Engaged in Mining of Strategic Minerals.

In the case of any domestic corporation engaged in the mining of * * * tungsten * * * the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this sub-chapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income.

Company, which owned and operated the Hennessy property from which the tungsten was extracted, in determining petitioner's adjusted excess profits net income. The amounts involved are not in controversy.

Section 731 of the 1939 Code, as amended, was construed in *Oregon Chrome Mines, Inc.*, 15 T. C. 389, affd. 192 F. 2d 783 (C.A. 9), wherein the purpose and legislative history of the provisions was reviewed. We think it unnecessary to reiterate what has there been stated.

In the instant proceeding, as in the *Oregon* case, *supra*, the question presented involves an interpretation of the phrase "engaged in mining" within the meaning of section 731 of the Code. In the *Oregon* case the word "mining" was construed to refer to the extraction of ore from the earth. It was there held that a lessee of a mine receiving royalty income from the lessor which extracted the strategic mineral was not entitled to exemption from excess profits tax under section 731.

In the taxable year 1944 petitioner received royalty income pursuant to the agreement dated December 31, 1941, with Bradley. The Hennessy property which produced the tungsten was owned and operated by Bradley. It owned the buildings and equipment and extracted the ore. Bradley also received the sales price upon which the royalty income in controversy was computed.

The respondent relies solely upon the *Oregon* case, *supra*, as authority here. After a careful re-

view of the entire record we are convinced that the instant case presents no material and controlling facts that would prevent the application of the rationale of the Oregon case, *supra*.

Petitioner, on brief, concedes that it did not extract minerals from the Stibnite properties during the taxable year involved. It states that a "slavish application of the literal language of the Ninth Circuit opinion in Oregon Chrome might foreclose the relief sought" and it urges a reconsideration and a broadening of the scope of the meaning of the phrase "engaged in mining," as used in section 731. This we decline to do. We are of the opinion that the Oregon case, *supra*, was correctly decided and that it is a controlling authority. Any appeal taken herein will go to the same Court of Appeals which affirmed our decision in the Oregon case, *supra*.

We therefore hold that the royalty income received by petitioner in the taxable year 1944 with respect to tungsten extracted from the Stibnite property was not exempt from excess profits tax under section 731 of the Internal Revenue Code of 1939. The respondent's determination is sustained.

Decision will be entered for the respondent.

Served December 26, 1956.

Filed and entered December 26, 1956.

The Tax Court of the United States
Docket No. 57500

UNITED MERCURY MINES COMPANY, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed December 26, 1956, it is Ordered and Decided: That there is a deficiency in excess profits tax for the year 1944 in the amount of \$113,453.68.

/s/ C. P. LeMIRE,
Judge.

Served December 28, 1956.

Filed and entered December 26, 1956.

United States Court of Appeals
for the Ninth Circuit
Docket No. 57500

UNITED MERCURY MINES COMPANY, a Cor-
poration,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

To the Clerk of the Tax Court of the United States:

Pursuant to the provisions of Rule 29 of the Rules of the United States Court of Appeals for the Ninth Circuit, notice is hereby given that the petitioner above named petitions the United States Court of Appeals for the Ninth Circuit for review of that certain order and decision of the Tax Court of the United States rendered and issued on the 26th day of December, 1956, Tax Court Docket No. 57500.

The controversy in this cause is the liability of the petitioner for excess profits tax for the calendar year 1944. By its order on the above date, the Tax Court of the United States determined a liability of the petitioner in the sum of \$113,453.68. It was and is the contention of the petitioner that it was exempt from such tax under and by virtue of the provisions of the statute then in effect, to wit, Section 731, Internal Revenue Code, for the reason that the petitioner was engaged in mining within the meaning of that section. Such contention was determined by the Tax Court adversely to petitioner.

Venue lies in the United States Court of Appeals for the Ninth Circuit for the reason that tax returns for the year in question were filed by the petitioner with the Collector of Internal Revenue for the District of Idaho.

Dated this 18th day of March, 1957.

JOHN A. CARVER, JR.,

DALE CLEMONS,

Attorneys for Petitioner.

Certificate of service attached.

Filed March 22, 1957, T.C.U.S.

[Title of Court Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, the petitioner hereby designates the entire record, including pleadings, exhibits and testimony, to constitute the transcript of record on review in the above-entitled case.

/s/ JOHN A. CARVER, JR.,

/s/ DALE CLEMONS,

Attorneys for Petitioner.

Certificate of service attached.

Filed April 9, 1957, T.C.U.S.

In the Tax Court of the United States
Docket No. 57500

UNITED MERCURY MINES COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Monday, April 30, 1956

The above-entitled matter came on for hearing,

pursuant to notice to the parties, at 10:37 o'clock a.m.

Before: Honorable Clarence P. LeMire, Judge,
Presiding.

Appearances:

MR. JOHN D. PICCO,
Bureau of Internal Revenue,
For the Respondent.

MR. JOHN A. CARVER, JR.,
For the Petitioner.

PROCEEDINGS

The Clerk: Docket Number 57500, United Mercury Mines Company.

Mr. Picco: John D. Picco, for the Respondent. This is a trial case, your Honor. John A. Carver, Jr., is the attorney for Petitioner. He is from Boise, Idaho. I saw him about a week ago and he told me at that time he wouldn't be able to make it today under any circumstances. He had some business down in San Francisco. He has since written me a letter and asked that the case be set, if at all possible, for Wednesday, Thursday or Friday of this week—any day.

The Court: Any time after Tuesday?

Mr. Picco: That's right. He tells me that it would be anywhere from three to five hours. He will only have one witness, but this witness apparently is rather a slow type of an individual and it will probably take five hours, if I gauge it correctly.

The Court: He thought it would take about one day to hear the case?

Mr. Picco: Yes.

The Court: Does the Government have any testimony?

Mr. Picco: No; no, the Government does not.

The Court: I will mark that one day.

Mr. Picco: I will phone him as soon as I find out when you set the case, your Honor.

The Court: Very well. [3*]

(Whereupon, at 10:40 o'clock a.m., the calendar call in this matter was concluded. The matter was subsequently set for hearing on May 2, 1956, and at 10:00 o'clock a.m. the hearing was called with the parties heretofore mentioned being present.)

The Clerk: I will call Docket 57500, United Mercury Mines Company.

Will counsel please state their appearances?

Mr. Picco: John D. Picco, for the Respondent.

Mr. Carver: John A. Carver, Jr., for the Petitioner.

The Court: Very well, gentlemen, you may proceed with your statements.

Mr. Carver: If the Court please, at this time, prior to making a statement, I would like leave, under Rule Twenty-five, to have recognized Mr. Dale Clemons of Boise, Idaho, a member of the bar of the Supreme Court of Idaho and the Ninth Circuit Court of Appeals. He has filed heretofore, on April 16th, an application for enrollment.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: It hasn't been acted on yet?

Mr. Carver: He has not received the certificate.

The Court: Very well.

Mr. Carver: May it please the Court——

The Clerk: Will you give me an appearance form before you leave the courtroom, please, Mr. Clemons?

Mr. Carver: May it please the Court, in this case, the issue is whether the Petitioner Corporation's adjusted excess profits [4] net income for the year 1944 was exempt from excess profits' tax by virtue of Section Seven Thirty-one of the Code, then in effect. This is the issue which was presented in Oregon Chrome Mines, Fifteen Tax Court, Three Eighty-nine, wherein the Court—Tax Court—divided five to four—majority opinion being affirmed by the United States Court of Appeals, One Ninety-two, Federal Second, Seven Eighty-three.

The Petitioner will show that the facts in the instant case are entirely different from those in Oregon Chrome; that, therefore, Oregon Chrome is not authority for the Commissioner's determination of deficiency. The Petitioner and Respondent have executed a stipulation which will be filed concerning the corporate status and structure of the Petitioner—concerning its chartered authority, filing of its corporate income tax returns, and that no excess profits tax returns were filed; that the Petitioner, since its organization in 1921, has been engaged in the mining business in Idaho and owns certain mineral properties, some of which yielded the values resulting in the income in question for the year

1944. Some of the claims, including those yielding the values here in controversy, were, during 1944, subject to the contract—the subject of a contract to Bradley Mining Company, dated December 31, 1941. We stipulated that the meaning of such contract has been litigated to the Ninth Circuit, United States Court of Appeals, and that under such contract, Bradley Mining Company operated and worked the properties and marketed and sold the ore and paid Petitioners sums called for in the contract—this was the source of [5] the income in question.

It was also stipulated that the Petitioner was engaged in actual mining of—in mining properties in the same general area for quicksilver in the years in question, and also for antimony—being adjoining properties.

In addition to the stipulated facts, the Petitioner is prepared to prove and will prove that the revenue in question was derived from mining a strategic mineral, tungsten; that the Petitioner Corporation not only acquired the properties many years ago and continuously performed prospecting and development work upon the properties, but, likewise, has been instrumental in the over-all mining operation, including activities performed both before and after the contract with the Bradley Mining Company, December 31, 1941. These activities included: Securing the performance of exploration work by the United States Government to block out the tungsten ore which yielded the values in question; assistance in road construction, for the purpose of

procuring electrical transmission lines to the property; and general developmental work upon the properties for the benefit of the enterprise outside and beyond the contract with the Bradley Mining Company.

In addition, the Petitioner will prove that during the years in question it contributed to the success of the enterprise by bearing a portion of the cost, construction of a treatment plant, built by Bradley Mining Company, to improve the quality of the ore after mining for shipment to the smelter, and by bearing a disproportionate [6] share of the cost of the transportation of some of the ore. Petitioner will show a capital commitment in the properties by 1944 in excess of four hundred thousand dollars.

Petitioner will show participation in the mining activities with reference to the instant properties which establish its qualification for the exemption provided in Section Seven Thirty-one, of the excess profits tax.

The Court: Very well.

Mr. Picco: Respondent asks leave to file the stipulation of facts, your Honor. It has been agreed to by both parties.

The Court: And what are the exhibits attached?

Mr. Picco: The exhibits are five—Exhibit 1A—they are all joint—1A to 5E, inclusive.

The Court: Very well. The stipulation with Exhibits 1A through 5E is received in evidence.

Mr. Picco: If your Honor please, the Petitioner here is claiming the benefits of Section Seven Hundred and Thirty-one, on the ground that it was en-

gaged in mining tungsten on the Stibnite properties in 1944. We have an Exhibit 3C, which is a map, showing the relative locations of the various mining claims in the Yellow Pine Mining District, Valley County, Idaho; and this is an extra—in fact, it is the copy from which the photostats have been made, and I think the Judge might like to see this as it goes along.

The Court: Very well.

(Map handed to the Court.)

Mr. Picco: We are interested [7] primarily in this section here, Stibnite.

The Court: Very well.

Mr. Picco: If your Honor please, the Statute, as you know, grants an exemption from excess profits tax to a corporation engaged in mining strategic minerals. The Tax Court in Oregon Chrome Mines, as Petitioner's counsel has mentioned, held that a lessor of a chrome mine was not entitled, or did not qualify as a beneficiary under the Statute. The word "mining" was defined as an operation involving the extraction of ore or the treating of ore. This decision was affirmed by the Ninth Circuit, at which time that Court limited the word "mining" to the extraction of ore. Now, the Petitioner herein, was the owner of the Stibnite Mining Claims back in the twenties, and from 1927 to 1941—during that period of time, it leased or optioned these properties or claims, to Bradley Mining Company, which will probably be referred to many times by the name "Bradley."

Now, on December 31, 1941, the Petitioner sold the Stibnite Mine to Bradley, pursuant to this agreement—conveyance instrument attached to the stipulation, Exhibit 4D. So, your Honor, in the years 1944 and 1945, Bradley owned, operated and worked the Stibnite properties. That has been stipulated, in effect, if not literally. The Petitioner is contending, as I understand it, that it developed the Stibnite properties. I think perhaps Respondent will be able to show that Bradley did more in that connection than United Mercury, the Petitioner. Petitioner received five per cent of the net receipts from [8] the operations of that property in 1944.

In addition—I will have to add this—that the Petitioner did own and operate some other tracts that are on that map—the Antimony Ridge Mine and they also operated the Cinnabar Claims, jointly with Bonanza—that is another firm. These particular operations, however, were conducted, so far as I can see, on a very limited scale, and resulted in losses in the years in question.

Respondent's position, therefore, is that the Petitioner did not engage in mining tungsten from the Stibnite Mines in 1944, and Respondent submits that the case is controlled by Oregon Chrome and urges that the Respondent's determination be sustained.

The Court: Anything further, Mr. Carver?

Mr. Carver: Nothing further, your Honor.

The Court: Very well, you may call your first witness.

Mr. Carver: We will call Mr. J. J. Oberbillig.

J. J. OBERBILLIG

a witness called by and on behalf of the Petitioner, first having been duly sworn, was examined and testified as follows:

The Clerk: Please state your name and your address for the record.

Mr. Carver: State your name and address for the record, Mr. Oberbillig.

The Witness: J. J. Oberbillig.

The Clerk: J. J.—please spell your last name.

The Witness: O-b-e-r-b-i double l-i-g. My address [9] is Box 448, Boise, Idaho.

Direct Examination

By Mr. Carver:

Q. Mr. Oberbillig, what is your occupation?

A. I have been in the mining business ever since—in actual mining business ever since 1902.

Q. What is your present connection with the Petitioner Corporation, United Mercury Mines?

A. President ever since 1921.

Q. And that was the year it was incorporated, is that correct?

A. The year it was incorporated.

Q. Now, you stated that you have been in the mining business since 1902—would you state your qualifications and experience in the various aspects of the mining business beginning with your training and experience in locating and prospecting mining claims?

(Testimony of J. J. Oberbillig.)

A. I have had an extensive experience along those lines. I have perhaps located at least eight hundred mining claims in my time, and perhaps purchased outright at least four hundred.

Q. Would you speak up just a little louder?

A. What?

Q. Would you speak a little louder if you could, Mr. Oberbillig?

A. Yes, I will. I have a hard time hearing, too.

Mr. Picco: That is all right, Mr. Oberbillig. I want [10] the Judge to hear what you have to say.

Q. Now, have you located and prospected claims yourself, personally?

A. Repeat that, will you?

Q. Have you located and prospected claims personally—had personal experience in the actual prospecting of mining claims?

A. Yes; I have in a considerable number of them, whenever I found a claim that had sufficient showings on it to justify the location. I always located it, especially in the Yellow Pine Mining District in Valley County, where these operations are going on now.

Q. Now, would you state your training and experience in the development of mines?

A. Well, I have had considerable experience in the development of mines and especially with good luck and was very fortunate in having these developments prove up ore, especially to that end wherever my work was directed. At Meadow Creek, which is part of this Bradley property that we sold

(Testimony of J. J. Oberbillig.)

to him, we opened up—I recommended to Bradley at the time of the purchase, that there was a million and a half in sight at that time. And when this mine was put into operation by Mr. Bradley it produced a million, seven hundred and eighty-six thousand dollars. Now, those are the figures, about, as I understand them.

The Court: Just a minute. Mr. Reporter, are you getting all that?

The Reporter: Yes, your Honor. [11]

The Court: The Court can't understand it. I want to be sure that the record is clear on it so that I will have the record before me.

Mr. Picco: I didn't get the year that he was talking about on this. I don't know whether he mentioned it or not.

Q. Would you speak up now, Mr. Oberbillig—direct it to the Court, so that he can hear you, and would you repeat for the Court and counsel the experience you have had in the development of mines? I am looking for your training and qualifications in developing mines.

A. I have developed mines in the Sea Foam (phonetic) District, the Blank Hornet District, the Yellow Jack District and numerous other districts in Idaho before I even went into the Yellow Pine Section. Is that better? Can you hear me?

Q. And what does the development—what does that work consist of, generally—just speaking generally?

A. Generally in tunnelling, cross-cutting and raises and in some instances sinking.

(Testimony of J. J. Oberbillig.)

Q. Now, have you had any experience, training, in the operation of mines? Have you been engaged in that work during this period of fifty-five years you mentioned?

A. Yes, yes; I have had a considerable experience, especially with the Bradley Mining Company.

Q. What mines have you operated?

A. I have operated the Cinnabar Mine, that is the Hermes [12] Group—quicksilver property, for nearly five years. I purchased that mine, or the interest, rather, from the Bonanza Mines Company in '49, and I carried on the developments there with a broken-down mine. I had everything to improve there. The works was caved in.

Q. Now, Mr. Oberbillig, during this period of time that you have been in the mining business, have you had experience and training in treatment, refining and other metallurgical aspects of mining?

A. Well, I first started out when I—when I first started out mining I was a professional assayer and I had a considerable knowledge of chemistry, and, of course, all those things are of a great help when you are operating a mine, because you can do your own assaying, do your own metallurgical work, and carry on your proposition on ores that would eventually become commercial.

Q. When did you first become interested in the mineral possibilities in the Yellow Pine Mining District in Idaho, Mr. Oberbillig?

A. In 1916.

Q. Now, what was the nature of your activities

(Testimony of J. J. Oberbillig.)

in connection with this interest, beginning with the time of your earliest visit to the properties?

A. When I first went in there, I went in to examine the Hermes Group, which was owned by Pringle Smith (phonetic). That was in July or August of 1916, and I was very elated over that property, because ores just stuck out—large croppings—quicksilver [13] ore, but the property was so isolated that it was very nearly prohibitive for anyone to undertake to try to operate that property and operate especially commercially, because there wasn't any roads in the country, or anything like that, see? The only conveyance we had in there—only transportation was by pack horse and pack string.

Q. What did you do in there, beginning in 1916?

A. I just made the examination and then I covered the—a large portion of the district. I have had a great deal of experience in geology and I travel over that district and I outlined several valuable ore structures that perhaps could be put into commercial use.

Q. Now, would you state just in a general way, Mr. Oberbillig, how the seven hundred claims referred to in the stipulation were assembled into the Petitioner Corporation?

A. The gathering in of those seven hundred claims run over a considerable period of time. In many places, where there was a good showing of ore, I purchased those claims, and at a very nominal figure. I would like to go back to '17—1917. That

(Testimony of J. J. Oberbillig.)

is the year—the summer when the United States declared war against Germany, in April, and then word was sent out for miners to get active and look up certain minerals. Well, I knew the quicksilver was there, so I went into the quicksilver field; and during that summer—during the summer of 1918, the Country was visited by several eminent geologists from Washington, and also from the Bureau of Mines of [14] Idaho and the University of Idaho, in the Geological Department, and then, of course, it meant to get active, because the Government was demanding some strategic minerals from that ore. And that fall, in 1918, the Armistice was signed and we were all there, holding property with the hope, you know, that we might get along a little further and get money to build roads in there and to get the material out economically. So, pretty near everybody in the country started to pull out—I stayed with the country and, of course, it meant a lot to me to stay with the country because I had an opportunity to purchase a lot of that property at practically my own price, and when I would purchase a group of claims—now, I am coming back to that—when I purchase a group of claims, I would protect them by making other locations along the ore structures and the outline of the ore zone, and so I kept that up until about '31—1931, and I built the property up, you might say, for Mr. Bradley at that time.

Q. Now, going back to the years immediately following incorporation, what was the nature of

(Testimony of J. J. Oberbillig.)

your developmental work on the properties referred to in the stipulation as the Cinnabar properties?

A. Well, on the Cinnabar property, you see, I—there is another company got in there ahead of me and that was called the Monumental Mercury Mines Company and, of course, when the war was over with, they gave up hope. Now, this Company bought that property for fifty thousand dollars. They paid five thousand dollars on it, and, well, in fact, they run out of money, so in July of 1920, I purchased that property from Mr. Smith (phonetic), who had still— [15] had the title to it, you know, and if the Monumental Mercury didn't pay the five thousand dollars due in that month, the property would revert back to him, so he came to me and he said that he would sell me that property. I told him that I would take the property on the basis of thirty-five thousand and pay him in six months. Now, I said, "That is an incentive to you," I says, "to make that deal to me." And he says, "Well, I will take you up with it." So they had sold eighty thousand shares of stock, and at that time I planned, you know, with the stockholders of that Company—at least, I met with them, you know, and they says, "Well, are you going to rob us out of our holdings?" I says, "No." I says, "I am going to give you stock—what you paid for, because I had the benefit of your work there—you develop." That was about eighty thousand shares. And I paid Monumental Mining Company approximately ten thousand—ten thousand dollars for this—

(Testimony of J. J. Oberbillig.)

Mr. Picco: Your Honor, I want to object to—Respondent doesn't mind giving some leeway here to just what developed back there, but it is difficult to follow as to whether he is talking about the property that we are interested in, and I think it is somewhat material. At the same time, I don't want to curb that too much, because the Oregon Chrome case has—the Court did mention in there about development, but I think we are getting a little off the beaten track.

The Court: Well, I can't see what bearing it has, but I am going to hear the testimony, Mr. Picco, for whatever it may be [16] worth.

Q. Perhaps, Mr. Oberbillig, now, what I would like you to tell the Court at this time, is what you did—what the Petitioner Corporation did after it was formed by way of blocking out and developing on the Cinnabar property.

A. Well, I took the property over——

Q. Beginning in 1921?

A. I took the property over in 1921.

Q. By that, you mean the Corporation did?

A. The Corporation took it over, and I immediately started the work of development and building camps for that property, and then I built some of the property down—I built trails around, down Cinnabar Creek, down Sugar Creek, up the East Fork to Meadow Creek, so that I would have a later season, you know, to deliver supplies.

Q. Now, did you have crews in there working at that time?

(Testimony of J. J. Oberbillig.)

A. I had three crews at that time working.

Q. What did they do?

A. They were developing—they were getting in the winter supplies—now, that means the wood and timber, you see, for mining—to carry on mining throughout the winter.

Mr. Picco: John, what year was this?

Q. Now, this was approximately—this was soon after 1921 we are speaking of, is that correct?

A. That is the winter of '21, '22 and so on. [17]

Q. In the years immediately following incorporation—now, you said you had crews in there. What did those crews do, did they open up tunnels?

A. In the first place, they got out their timber for the winter use, see, and the wood, and then we went to work and we were developing, you see. That is where I developed the Meadow Creek Mine, and put—well, I had a million and seven hundred thousand dollars blocked there.

Q. When was that blocked out?

A. That, I had that blocked out by 19—1923.

Q. 1923?

A. I had that blocked out by that time.

Q. What did you have blocked out on the Cinnabar by 1923?

A. Over a million pounds of mercury, and that was actually blocked, because I had run an intermediate from my lower works—had that ore proven right to a T.

Q. That development work on Cinnabar then, had the ore actually blocked out in '23?

(Testimony of J. J. Oberbillig.)

A. Yes.

Q. Now, I believe you have mentioned—I would like to ask you further concerning it—what work did you do on the Meadow Creek properties, to block out the ore in the early '20's?

A. That is where I had developed a million and a half dollars, according to my figures.

Q. On the Meadow Creek? [18]

A. On Meadow Creek.

Q. And that is a part of what is now referred to as the Stibnite properties in the stipulation, is that correct?

A. Yes; Meadow Creek is part of it, but the Meadow Creek has been shut down ever since 1937.

Q. Now, in connection with this development work—were there shafts run—dug and tunnels run, and so on?

A. There were just tunnels, cross-cuts and raises on the Meadow Creek when I turned the property over to Mr. Bradley.

Q. Now, what other development work—was there trenching?

A. Well, that is all surface work, you know, where we done our prospecting along the strike of the zone.

Q. You did that work with crews at that time?

A. Yes.

Q. Did you——

A. I named that ore structure the Meadow Creek Fault Zone, see? It was a large body of ore.

Q. Now, this work was done by the Petitioner

(Testimony of J. J. Oberbillig.)

Corporation, United Mercury? A. Yes, sir.

Q. Did you, personally, supervise it?

A. Oh, yes; I personally supervised that.

Q. Did you go in there on the property?

A. Yes; there is some winters I would make six trips in there on snowshoes, every month, to pay the men. [19]

Mr. Picco: What years are we talking about?

Q. Now, this is again speaking of the early years of incorporation, '21, '2, '3 and '4, is that correct?

A. Yes, sir.

Mr. Picco: This may seem a little unusual. I should maybe take it up on cross-examination, but I want the Judge to see the whole picture. When you are talking about "blocking out ores," are we talking about tungsten when we do that, or what are we talking about?

Mr. Carver: Well, I will ask the witness——

Mr. Picco: I wish you would bring that out now, if you will.

Q. Now, you blocked out, you mentioned quick-silver on the Cinnabar. What did you block out on Meadow Creek? What ore was that million and a half you referred to?

A. Well, now, he refers to tungsten there, that——

Q. Well, just——

A. ——would take me to the——

Q. Just answer—we are talking about the early '20's, now; what ore was that?

A. That was gold and antimony.

(Testimony of J. J. Oberbillig.)

Q. That's fine. Now, would you describe, briefly, the metallurgical problems which existed in connection with the ores which were disclosed in these early years?

A. Well, the Meadow Creek ores and especially all gold-antimony [20] ores of that vicinity—that is, the Yellow Pine Mining District—consisted of one of the most difficult metallurgical problems ever known in ore in the history of ore treatment. Now, there is no question about that, because I worked on that ore, and the best that I could recover was thirty per cent; and, of course, Mr. Fred—F. W. Bradley, he wouldn't stand back against anything—when I wrote him the letter—it was just a handwritten letter, he says, “Of course I am interested,” and I explained everything to him, and he come in then, in '27 and took that property over. That is what held us up, you know, was the metallurgical problems.

Q. Now, during the early 1920's, Mr. Oberbillig, did the Petitioner Corporation enter into any negotiations for sale, lease or other contractual disposition of the properties? Were you trying to get operating companies in there interested in them?

A. I interested the Homestake Mining Company, and they sent in their chief geologist in 1924 and he was very elated over the entire set-up. So, I told him, I says, “You had better wait until you get your samples back to Lead, South Dakota.” And, I says, “We talk about”—“Oh, no,” he says, “you come on right along, we'll make the deal.” Right

(Testimony of J. J. Oberbillig.)

away, they were going to pay a million dollars cash at that time. They had the money. So, when they worked on the ore, the metallurgist bluffed and they couldn't cut it. He claimed they were covered thirty-five per cent.

Q. Now, would you——

A. The property was then—they gave up the property. They [21] tried for a year on it.

Q. Now, turn, if you would, and address your replies to the Court, so that he can hear you clearly. When was the first time that the Bradley interest came in and became interested in these properties?

A. In May of 1927.

Q. Now, who came at that time?

A. His experts—his engineers.

Q. Who was Fred W. Bradley in the mining business at that time?

A. Well, Mr. Fred Bradley was one of the outstanding mine operators in the world. He was the President of the Bunker Hill and Sullivan and had various other interests all over the Country.

Q. Where was his headquarters?

A. San Francisco.

Q. Now, what were the negotiations that took place in 1927 concerning these properties with Bradley, and what properties were you discussing at that time?

A. The entire field—the Meadow Creek Group, the Cinnabar Group and Antimony Ridge—they were all grouped into just the one thing, and they all belonged to the United Mercury at the time.

(Testimony of J. J. Oberbillig.)

Q. Now, at that time, did you enter into an option agreement with the Bradley interests?

A. Yes; on May 5th—on August 5th, 1927, we entered into the first contract.

Q. Now, state in a general way what the terms and conditions [22] of that contract were? May I approach the witness, please, your Honor?

The Court: You may. Is that an exhibit in this case?

Mr. Carver: Yes, your Honor.

The Court: What is the exhibit number?

Mr. Carver: It is not an exhibit, I beg your pardon. I plan to offer it.

The Court: Very well. Go ahead.

The Clerk: Exhibit 6 for identification.

(Petitioner's Exhibit 6, Witness Oberbillig, marked for identification.)

Q. Now, handing you what has been marked as "Exhibit 6 for Identification," Mr. Oberbillig, I will ask you if that is a copy of the 1927 agreement that you have just referred to? A. Yes, sir.

Q. That is the contract that was entered into with the Bradley Mining Company at that time?

A. That was the first contract.

Mr. Carver: If the Court please, we have submitted a copy to counsel and have submitted the original books of record of the Corporation—they have seen the contract. We do not have an executed original other than the official one in the corporate records.

Mr. Picco: We are willing to stipulate that in,

(Testimony of J. J. Oberbillig.)

your Honor. I am acquainted with it. I have looked it over. I was up until 11:00 o'clock last night looking over this stuff.

The Court: And you are willing to stipulate that the [23] copy marked as Exhibit——

Mr. Picco: Is a copy of the original.

The Court: Is a true and correct copy of the original?

Mr. Carver: With one exception, if the Court please, and that is that the claims listed are not set forth in detail—I think it may be stipulated that they were the same ones which occur in the later contracts. They are referred to by groups and we did not list them.

Mr. Picco: If counsel moves for admission, I have no objection.

Mr. Carver: I move the admission of the exhibit, your Honor.

The Court: Very well. As there is no objection, Petitioner's Exhibit Number 6 is received.

(Whereupon, Petitioner's Exhibit 6 for Identification, Witness Oberbillig, was received in evidence.)

Mr. Carver: Now, if the Court please, in connection with this exhibit, there were subsequent modifications and so on, which again have furnished to counsel. It would be agreeable with us to have the witness just summarize that there were such, but if counsel——

Mr. Picco: Why don't you put in the last one

(Testimony of J. J. Oberbillig.)

there prior to '44; leave the modifications out of it.

Mr. Carver: I think it is agreeable with counsel if I [24] may approach the witness again, your Honor.

The Court: You may.

The Clerk: Exhibit 7 for identification.

(Petitioner's Exhibit 7, Witness Oberbillig, marked for identification.)

Q. (By Mr. Carver): Handing you what has been marked as "Petitioner's Exhibit 7 for identification," is this the 1939 contract with the Bradley Mining Company?

A. Yes, sir; that is what this is.

Mr. Carver: I believe it may be stipulated by counsel this is also a copy, again excluding the description of the claims of the 1939 contract with the Bradley Mining Company.

Mr. Picco: Respondent has no objection to the introduction of that in evidence.

The Court: Very well, there being no objection, Petitioner's Exhibit 7 is received in evidence.

(Whereupon, Petitioner's Exhibit 7 for identification, Witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Now, Mr. Oberbillig, during 1944, a considerable amount of tungsten ore was removed from the so-called Hennessey Group. It is correct, is it not, that this was the ore which resulted in the values in question—that is, the

(Testimony of J. J. Oberbillig.)

tungsten which Bradley took out in '44 came from the so-called Hennessey Group? A. Yes, sir.

Q. The Hennessey Group is within the Stibnite property and [25] identified on the Exhibit. Would you tell the Court what the Petitioner Corporation did with respect to the location and development, initially, of the Hennessey Group, beginning in the early 1920's?

A. Well, in 1923, I constructed this trail around, located all those claims and I didn't want to record those claims that year because I had so many claims to do assessment work on; and that fall, in October, Mr. Hennessey put his location notices on them and recorded them. That was a very tough blow, but even at that, we went along, and in 19—when I made the deal with Mr. Bradley in 1927, Mr. Bradley purchased those claims and his geologists, his engineers, failed to find any ore after Mr. Bradley had spent in the neighborhood of thirty thousand dollars.

Q. Now, if I may interrupt you to clarify the matter, he purchased them from Hennessey, is that correct?

A. From Hennessey, yes, which was the Great Northern Mines Company at that time.

Q. You had, prior to that, located—actually done some work on them? A. Yes, and lost them.

Q. And lost them? Now, would you describe for the Court, the nature of the ore structure on the Hennessey Group, and particularly the showings as

(Testimony of J. J. Oberbillig.)

disclosed by the developing and prospecting work which your Company did in the early stages?

A. When it was recommended to Mr. Bradley by his chief geologists and his engineers that there wasn't any ore there, Mr. [26] Bradley abandoned his contract, and I immediately took the matter up with Mr. Bradley that I was very certain that his geologist and his engineer didn't know what he was talking about. Now, Mr. Hershey (phonetic) was a very eminent geologist and recognized so, but I had done small development work—shallow cuts, you know, and I had the ore well determined on that property, so in '33, in February, I went to San Francisco and told Mr. Bradley the whole story, and Mr. Bradley says, "You go right back and locate that, and whatever it is," he says, "you think you can get them for twenty or twenty-five thousand dollars?" I says, "I think I can, and we will get it back into the enterprise." Well, unfortunately, Mr. Bradley passed away in July of that year. Then, of course, we had that cloud again, you know, to deal with. We had no leader then. Mr. Phil Bradley was a very good man and a fellow that was willing to take a chance, so it was a little later that fall—the mine just drug along then, until a little later that fall, Barney Brooke (phonetic) came to the mine with his engineer, and between Mr. Brooke and myself, we straightened things out; and although, prior to that, I had bought fifty-one per cent interest in the Hennessey Group, and after we had it all straightened out, why, the prop-

(Testimony of J. J. Oberbillig.)

erty was thrown into the enterprise then so that we could all participate.

Q. The United Mercury Mines Company then purchased the Hennessey Group and turned it over to Bradley between the dates of the 1927 contract and the 1939 contract?

A. Well, it went into the 1930 contract. [27]

Q. After 1927? A. Yes.

Mr. Picco: Have him explain what he means by the word "enterprise," I don't understand that.

Q. Now, at that time, Mr. Oberbillig, what physical work was being done on the properties by your Company?

A. Well, I carried on development work and proved up the ore so that Mr. Phil Bradley, when he came in that fall, so he could see what these—this work resulted in the proving of ore. I opened up sufficient ore—that ore structure at that one point was about five hundred feet wide and about eight hundred feet long. That is, it was thoroughly definitely proved that that ore was there, see?

Q. It is the case, isn't it, Mr. Oberbillig, that during the period following the 1927 contract when all of these properties were optioned to Bradley—that was all the properties in the Yellow Pine District—when you are referring to the "enterprise" you are referring to the development of the mineral potential in that entire area, is that correct?

A. Well, no; when I was referring to the minerals, I was referring to the Hennessey Group at that time.

(Testimony of J. J. Oberbillig.)

Q. I see, but now, when you—in your negotiations with Bradley——

A. Included everything.

Q. That included everything?

A. For a million and a half dollars. [28]

Q. That included Cinnabar and it included the Stibnite properties and the Antimony Ridge properties?

A. Yes; it was a million five hundred and fifty thousand dollars was the purchase price.

Q. That was the option of 1927?

A. Yes, sir.

Q. But your Company continued to perform developmental work after that, to develop it for that enterprise, isn't that correct?

A. Oh, yes; I kept up the work. I located hundreds of claims to fill in all over for the enterprise.

Q. That was after the date of—after 1927?

A. Yes, it was——(unfinished answer).

Q. Well, what mills were operating on the properties in the 1930's?

A. That was a pilot mill. It was designed to concentrate the ore and besides the pilot mill, there was a roasting plant put in there to volatilize and free the iron concentrate which carried the gold pyrites, you see, but that was a total failure.

Q. Who put that mill in?

A. Mr. Bradley put that in and it was quite a disappointment to him, and then the mill ran at a loss for approximately eight months.

Q. Now——

(Testimony of J. J. Oberbillig.)

A. It was a little more than eight months run at a loss.

Q. During the period after 1927, when this first option agreement was signed, did your Corporation determine at any time [29] that the Bradley Mining Company was not complying with their contractual duties in developing the property?

A. Did what?

Q. Did your Corporation determine that Bradley Mining Company was not living up to the terms of its agreement?

A. Oh, the Bradley Mining Company lived up to the terms of the agreement when Mr. Bradley was alive all along until after he had passed away.

Q. Now, after he had passed away, particularly in 1939, did the Corporation determine to cancel that contract?

A. The '39 contract was a new contract——

Q. To cancel the 1930 contract?

A. Yes; it cancelled all the previous contracts and they were merged into the '39 contract.

Mr. Carver: May I approach the witness, your Honor?

The Court: You may. If that is to be an exhibit, you had better have it marked for identification.

Mr. Carver: Yes, your Honor.

The Clerk: Exhibit 8 for identification.

(Petitioner's Exhibit 8, Witness Oberbillig, marked for identification.)

Q. Now, handing you what has been marked as

(Testimony of J. J. Oberbillig.)

“Exhibit 8 for identification,” Mr. Oberbillig, is that a copy of a resolution of your Corporation in 1939, concerning the performance by Bradley of the terms and conditions of the contract then in [30] effect? A. That is a correct copy of it.

Q. And that’s a copy of what is taken from the original minutes book here before the Court?

A. Yes, sir.

Mr. Carver: This has been furnished counsel, and also the minutes books have been available.

Mr. Picco: I don’t have a copy of that.

Mr. Carver: It is in that statement which I furnished.

Mr. Picco: There were a lot of things furnished, but I take it that that is correct, if you say so.

Mr. Carver: Yes, it is.

The Court: There is no objection?

Mr. Picco: No objection.

The Court: Very well, there being no objection, Petitioner’s Exhibit Number 8 is received in evidence.

(Whereupon, Petitioner’s Exhibit 8 for identification, Witness Oberbillig, received in evidence.)

Mr. Picco: That is a resolution. What year is that?

Mr. Carver: 1939.

Mr. Picco: 1939—that’s the corporate minutes—stockholders’ meeting?

Mr. Carver: Stockholders’ meeting, yes.

(Testimony of J. J. Oberbillig.)

The Court: What date in 1939, can you give us the date of it?

Mr. Carver: That date, if your Honor please, is May [31] the 5th, I believe.

The Court: Do your minutes books show?

The Witness: Are you looking for that one?

Mr. Carver: Yes, for that one.

The Witness: It is in the other book. The resolution is in the other book.

Mr. Carver: Well, in the interest of time, if your Honor please, could I furnish that at the next recess?

The Court: Oh, yes; that's all right. You——

Mr. Picco: I may make this suggestion, if it is convenient, that we identify the corporate minutes—the two books, and not put them in evidence, but just, if necessary, read from the portions that are deemed material.

The Court: Well, I would like to have the documents into evidence, if possible, containing a correct recital of those minutes rather than to read them into evidence.

Mr. Picco: I may have occasion to go into the records in the corporate minutes once or twice. I don't have copies made out of that. It will be a short—I would like to be able to withdraw some of that just by word of mouth more than anything else.

Mr. Carver: The date, your Honor, was March 20th.

The Court: Very well.

Q. (By Mr. Carver): What was the purpose of

(Testimony of J. J. Oberbillig.)

the United Mercury Mines Company, the Petitioner Corporation, in turning over [32] the Hennessey Group to the Bradley interests?

A. Well, the real purpose for turning that over was to get it back into the enterprise and that we can get work started again. Mr. Bradley, at that time—I think it was '37, I am pretty sure, he closed Meadow Creek down because he didn't want to pay that eminent metallurgist who discovered the process for putting that ore, and putting the—working out the metallurgy that put the mine on its feet. Immediately, the mine went from the red into the black when this young metallurgical genius had that process worked out, and I doubt whether there was another man in the United States could have worked that thing out, outside of him.

The Court: Now, the Court is laboring under the impression that the Mr. Bradley first mentioned was deceased in 1930. Now, is there another Bradley coming into the picture?

Q. Yes; if you will identify that, Mr. Oberbillig?

A. Yes; that was Mr. John—Mr. Fred Bradley worked along—or Phil Bradley worked along nice—that was a brother to Fred Bradley, the old man—he was an uncle to the young fellow that came and took charge of it and then just because this young metallurgist was to have a royalty, he shuts that mine down.

The Court: Well, now, which one of them was it that died in 1930?

A. That is Mr. Fred Bradley.

(Testimony of J. J. Oberbillig.)

The Court: And when you——

A. No; in 1933. [33]

The Court: '33?

A. Yes.

The Court: And the Bradley you are speaking of now in 1939 was Mr. Phil Bradley?

A. No; that was Mr. John D. Bradley.

The Court: John D. Bradley. Very well.

A. The young fellow.

Mr. Picco: If your Honor please, Respondent would like to interject a comment: In our stipulation, we refer to the word "Bradley," and we are referring to the Bradley Mining Company where we do that, and I think that it might be agreeable with counsel that when we use the word "Bradley" by itself, we are referring to the Mining Company; and when we are referring to individuals, we should qualify them as "Mr." or some other——

The Court: Well, the given name. If you are referring to Fred Bradley, call it "Fred Bradley." If you are referring to John Bradley——

Mr. Picco: It is awful easy to get confused about this, because we don't know what we are talking about a good deal of the time here with all these claims. We are all over the county of——

A. Well, I think that is very nice of you.

Q. (By Mr. Carver): Now, Mr. Oberbillig, would you describe the activities of your Corporation, the United Mercury Mines Company, in connection with securing the Government drilling pro-

(Testimony of J. J. Oberbillig.)

gram for these [34] properties, and particularly the Hennessey group?

A. I had opened up the ore during '33, before there was very much work done on that, but we had to have ore, and—now, in 1926 and 27, I worked down there. However, the property was already turned into the Bradley Mining Company, you see, and into the enterprise. We agreed to that in our contracts, that any property located, you know, within the exterior boundaries of the property belonged to the enterprise, and that was a protection for both companies.

Mr. Picco: The "enterprise" meaning Bradley Mining Company? A. That's right.

Q. Now, again, Mr. Oberbillig, what did your Corporation do to get a Government drilling program on this particular property?

A. In 1937, I took my—all the pictures that I had—my movie reel and everything, and I went to Washington. I conceived the idea that the prospectors were extinct—we didn't have any of the old-time prospectors to look for ore, and I used the argument that war was inevitable with Germany, so I talked up with the Bureau of Mines and Geological Survey whether it wouldn't be a good plan for the Government to put on a drilling program, and I had a very favorable response from the Bureau of Mines, and of course, I was well acquainted with several congressmen and senators, and especially with Compton White from Idaho, who was a very ardent worker; and finally, the spring of

(Testimony of J. J. Oberbillig.)

'39, Congress appropriated the money [35] for the drilling program and the Bureau of Mines gave me the opportunity to sign the first contracts that were signed in the United States to drill for strategic minerals.

The Clerk: Exhibit 9 for identification.

(Petitioner's Exhibit 9, witness Oberbillig, marked for identification.)

Q. Handing you what has been marked as "Exhibit 9 for identification," Mr. Oberbillig, would you state what that is?

A. That is the contract with the Government.

Q. That is the Minerals Exploration Contract?

A. Yes.

Q. And what properties did that have reference to?

A. That had reference to the Hennessey Group.

Q. Did you execute that contract? A. Yes.

Q. Along with Bradley and the United States Government? A. Yes. Now——

Q. This is an original copy, is it not?

A. Yes, that's all right.

Mr. Carver: Copies have been furnished to counsel. A. We want to expedite this.

Mr. Carver: We would like to introduce this into evidence.

Mr. Picco: I would like to ask a question about this. Now, Mr. Oberbillig—John D. Bradley signing for Bradley Mining Company on this, did he [36] not? A. Yes.

(Testimony of J. J. Oberbillig.)

Mr. Picco: And he participated in this as much as you did, did he not?

A. Yes, sir. No, not in the—he had nothing to do with it. We were to drill this the previous year, but he run us off, and then I had the Bureau of Mines come, and then we signed with Bradley that contract. That is the copy of the original contract all right. Yes, sir.

Mr. Picco: Well, just—— (interrupted)

A. Bradley wanted his name attached to it because all the other contracts were signed by me, you know, and I figured that I could sign the contracts to drill because he only had an option on the property.

Mr. Picco: Now, Mr. Oberbillig, you couldn't have gone out and drilled without his permission, could you?

A. Well, I don't know. Probably—we'd have probably tried it.

Mr. Picco: You want to tell the Court then that this signature is on here simply because he wanted to sign it; not because it was necessary?

A. Oh, he didn't like it at all. I will explain that to the Court:

Mr. Picco: I wish you would.

Mr. Carver: If the Court please, I would like to state at this time that it probably is more proper for cross-examination [37] than—— (interrupted)

Mr. Picco: You are right. I have no objection to this, your Honor.

The Court: Very well, there being no objection.

(Testimony of J. J. Oberbillig.)

Petitioner's Exhibit Number 9 is received in evidence.

(Whereupon, Petitioner's Exhibit 9 for identification, witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Now, after that contract was signed, did the drilling take place on those properties?

A. Some time afterward a little. Mr. Jackson (phonetic), the Chief Engineer of the Bureau of Mines, telephoned me from Las Vegas, and he says "I guess we won't have a chance to drill that pet property of yours?" Well, I says, "You come on," I says, "I think we can drill," I says, "I assure you that we can drill." So they came and then Mr. Jackson and Mr. Gardiner and Mr. Lorraine (all phonetic), we visited the properties that they had previously drilled. Then I took them over and introduced them to Mr. John Bradley and he was kind of cold, you know. I says, "We are going to drill." So, when they stood around there and Mr. Jackson says to me, "My God, John," he says, "are you going to drill this ground here?" I says, "We sure will." I says, "We sure will." I says, "There is a lot of compound faulting here and I look for a big mine here for antimony and we are liable to have it," and I says, "and we will need that metal." I says, "I didn't know anything about the tungsten." The first hole that was put down, through thirty-five feet of debris [38] disclosed seven—

(Testimony of J. J. Oberbillig.)

thirty-two feet of tungsten ore—high-grade tungsten ore.

Q. That was the first discovery of tungsten?

A. First discovery of tungsten ore and then we drilled six or seven more holes there, and then we worked out the 1941 contract.

Q. Now, you were there—— (interrupted)

Mr. Picco: If your Honor please, I want to tie this witness down to some of the years here. I mean, he is rambling all over the place, and I don't mind that so much if he would just tie it into the property and into the year.

The Court: Yes. Well, let us have that clear.

Q. What year did that drilling take place?

A. The drilling took place during July—either July or August of 1941.

Q. That was under the terms of this contract?

A. Yes, sir.

The Court: Under the 1939 contract and your contract with the Government?

A. Yes, that was done under that contract—1939.

Q. And you were there representing your Company and participating in that program at that time, is that correct?

A. I was there practically all the time to see what the results would be.

Q. Now, you mentioned, I believe, that you had the Bureau of Mines—came in there after 1939. Would you state to the Court what [39] activities your Company performed in this prospecting and

(Testimony of J. J. Oberbillig.)

other work in which you were assisted by the Bureau of Mines, beginning in 1939 up to 1944?

A. The Bureau of Mines finished drilling on this that summer, on the Hennessey Group, and then the next year, they went over onto Cinnabar and drilled that. I run into the same difficulty there because the Bonanza people didn't want any interference with the Government. Now, those were the only properties been drilled at that time.

Q. Were Bureau of Mines personnel on the grounds prior to this drilling? A. Prior to it?

Q. Prior to the 1941 drilling?

A. Mr. Lorraine (phonetic) was there—he was the one—he was the Chief at that time in the field, you know, for the drilling program.

Q. That was prior to the drilling?

A. And he was refused permission to drill on the Hennessey property in '40.

Q. Who took him in there? A. Huh?

Q. Who took Mr. Lorraine in there?

A. Oh, Mr. Lorraine went in himself. I had taken him in there, and he knew the country.

Q. Now, just to tie it down, this tungsten discovery on the Hennessey Group was at the place where the big mine operated which [40] produced the values in 1944, is that correct?

A. That is correct, yes.

Q. That is what they call the “common pit” there?

A. Yes, the big pit, and that pit produced far

(Testimony of J. J. Oberbillig.)

in excess of twenty-five million. Bradley had so stated in his affidavit in the other case.

Q. Now, beginning in 1921 up through 19—the end of '43, what was the total capital investment of your Corporation in work on these properties?

A. Oh, around four-hundred thousand dollars.

Q. Was the matter of the cost for the capital investment the subject of a revenue examination about 1937?

A. Was a what?

Q. Didn't your Corporation have—didn't the matter of these values come into controversy concerning some income tax liabilities in the early 30's?

A. That was in '36—either '35 or '36.

Q. And at that time, Mr. Oberbillig, did you and the Internal Revenue Department come to an agreement concerning the amount of your capital investment as of that time?

A. I wish I knew the young fellow's name—he is here connected with the Bureau—with the Revenue Department—I don't know his name. He and my secretary, who was a very high-class and honorable man—he was with me for fourteen years, and he had the idea that the United Mercury should have its capital investment back [41] before it had to pay income tax, so Mr. Calch (phonetic) was sick and he left me and I hired Mr. Middleton (phonetic) then, and we went to Salt Lake City and we worked out that proposition there, and well, the tax people in Salt Lake then told me that—we were kidding a little, too, and he says, "Well, you have got us hooked for about two thousand dollars." I says,

(Testimony of J. J. Oberbillig.)

“How come?” He says, “The Statute run against you.”

Mr. Picco: If your Honor please, I think so much of this is——

The Court: Yes, that is immaterial.

Mr. Carver: May I approach the witness, your Honor?

The Court: You may. The conversations are not material in this.

The Clerk: Exhibit 10.

(Petitioner's Exhibit 10, witness Oberbillig, marked for identification.)

Q. I hand you what has been marked as “Exhibit 10 for identification.” Is this the evaluation report you got from the Internal Revenue Department involving the years in question, 1933 and 4?

A. Yes, I am sure this is.

Q. This came from the records of the Company?

A. Yes, this, I am pretty sure that that is the same one.

Mr. Carver: Now, I have previously shown this to counsel. I am sure that he hasn't had time to make a study of it.

Mr. Picco: I don't remember reading it. I would like [42] to look at it.

(Document handed.)

A. Well, anyway, Mr. Picco, whatever that was, you know, when he said that I—my—Statute had run against him, I told——

Mr. Carver: Well, now, the Court ruled that——

The Court: That is not material in this case.

A. Oh, that's out?

(Testimony of J. J. Oberbillig.)

Mr. Picco: Were you introducing this?

Mr. Carver: We offer this in evidence for the purpose of showing that as of 1933, the capital investment was about three hundred and thirty thousand dollars, based upon the valuation engineer's report, which this is—it is a carbon copy. We do not have the original.

Mr. Picco: I would like to ask a question: Do you know anything about this report? Who signed it?

A. Marcell (phonetic)—not Marcell, but I just can't think of the fellow's name.

Mr. Picco: This wasn't—this was addressed to the Internal Revenue Agent in Charge, Salt Lake City?

A. Yes, he is the big man in there.

Mr. Picco: You are not familiar with anything that was done here or how this was prepared?

A. Oh, I sit all through it, you know, but I don't remember very much about it. All I remember, you know, I straightened out [43] my account with them—whether Statute or no Statutes.

Mr. Picco: You don't know whether it was referring to valuation of the mining claims or what it is, do you?

A. Oh, I know they put a certain valuation on it, and I let it go.

Mr. Carver: I believe it speaks for itself, Mr. Picco.

A. I think it was around—

Mr. Carver: This is a Government—this is a Government report.

(Testimony of J. J. Oberbillig.)

Mr. Picco: Your Honor, I absolutely object to this going into evidence. I see that it has no materiality. In fact, this witness can't identify this properly—can't tell us what it is. It could be referring to a thousand other things. It is, as I examine this—it is going to the Internal Revenue Agent in Charge in Salt Lake City. To whom is it going?

Mr. Carver: It is signed by the Internal Revenue—it is shown—it is a copy showing the——

The Court: Let me see the document, please.

Mr. Picco: I want the Court to look at this. I do think we are getting rather far afield. I don't think that this helps. I think he may make his own statement as to his own knowledge of things. I don't see why we have to pick on the private correspondence of the Internal Revenue Service to prove anything in this case.

(Document handed.)

Mr. Picco: I further object on it that if it is an agreement [44] of the value, that is not the material thing. If he wants to testify of his own knowledge what it is, your Honor, and has knowledge, that would be more proper. Not only that—I just glanced at that—I haven't had time to examine it. It looks to me like that it is really covering the whole county—Valley County, Idaho. It doesn't apply only to the property in question.

The Court: Well, there is some evidence—there is some indication that this was a report supplied him by J. D. Carr, Engineer Revenue Agent, and it does indicate what the Revenue Agent said that

(Testimony of J. J. Oberbillig.)

may be accepted as the actual cost of the properties. And this is directed, of course, to the Internal Revenue Agent in Charge. I take it the original report was sent to him and a copy of the report was sent to this party. While I may say that it is not absolutely binding, it is some indication of the value of the property and I wish you would look it over. We are going to recess now for about ten minutes, and look it over, and if it will be of any benefit to the Court, why, I would be glad to have it.

Mr. Picco: Yes, your Honor.

The Court: And if you can withdraw your objection, I will appreciate it.

Very well, we will be in recess for about ten minutes.

(Whereupon, a recess was taken at 11:15 o'clock a.m. until 11:35 o'clock a.m., at which time the hearing reconvened, with the parties heretofore mentioned being present.)

The Court: Very well, you may proceed, gentlemen. [45]

Mr. Picco: If your Honor please, we were discussing this Exhibit 10. Respondent has interjected an objection and we maintain our objection, that it is not material; secondly, that this person cannot properly identify this and lay the foundation for the entry of this in evidence; third, this deals in valuations and doesn't go into costs—doesn't show; and fourthly, as far as I can see, it is referring to claims that may not have a thing to do with the particular

(Testimony of J. J. Oberbillig.)

piece of property we have in evidence and in this proceedings.

Mr. Carver: As to the last point, your Honor, we can further identify those—they are the same. As to the earlier points, it is corroborative, we will admit, but we think, nevertheless, that it is relevant and it is competent, because it tends, by a carbon copy of a report, that the Government back up what this witness has said about what he had in this property by way of cost—to show a substantial figure.

The Court: Well, I am going to admit it for what it's worth. I am going to overrule your objection, but I will say this, if I find that it is incompetent and irrelevant, I am going to disregard it, so don't rely on that entirely in your proof of valuation.

Mr. Carver: That's agreeable, your Honor.

(Whereupon, Petitioner's Exhibit 10 for identification, witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Mr. Oberbillig, I ask you about the nature of the cost of the capital commitment in these properties— [46] what was your—how much money was raised and put into these properties during the period from the time of incorporation up until 1944?

A. There would be around four hundred thousand dollars through the—yes, a little more, probably, four hundred and fifty thousand, through the

(Testimony of J. J. Oberbillig.)

sale of stock. But you know, in the early stages, the stock was sold at five cents a share and in many cases, I gave back—or paid back the money, you see, that they had put in, and give them eight per cent interest on it, and then I resold the stock at ten cents and took and put the money into the treasury, and I think that there was something like eighty thousand dollars went into the treasury. I know it is passed seventy thousand from there——

Q. The money——

A. ——the money that was spent would raise the ante.

Q. The money that was raised was spent on the property, is that correct? A. Do what?

Q. The money went onto the property?

A. Oh, yes, every bit of it went on the property.

Q. What was your salary during this period?

A. Seventy—I drew around seventy-five dollars; then for a long period, thirty-five dollars a month.

Q. A month?

A. Then I think there was one time there I drew a hundred and [47] fifty dollars. But I all the way through paid my—all my expenses in raising this money, except for one hundred dollars, and I don't know how that got on the books.

Q. And the money that you raised then, did not go for administrative overhead for you, for salaries and such as that—went on the property?

A. Oh, yes.

Q. Now, what was it used for on the property?

(Testimony of J. J. Oberbillig.)

A. For development and to improve the property, and to keep——

Q. What was done——

A. ——things a going.

Q. I beg your pardon?

A. And to keep things a going.

Q. What—salaries——

A. And I paid—I paid my secretary and auditor seventy-five dollars a month, you know. That was a lot of money.

Q. But you raised over four hundred thousand dollars and spent it on this property, is that correct?

A. Oh, yes, it was more than that spent.

Q. Speak up so the Court can hear you.

A. I say there was more than that spent there.

Q. On the property?

A. You see, we sold ore, too, you know.

Mr. Carver: May I approach the witness, your Honor? [48]

The Clerk: Exhibit 11 for identification.

(Petitioner's Exhibit 11, witness Oberbillig, marked for identification.)

Q. Handing you what has been marked as "Exhibit 11 for identification," being a group of three photostats, state if you will what those are?

A. This is the entire group up to 1930 of the—what we always called the Meadow Creek and Cinabar Group and the Sugar Creek Group.

Q. That is a map, is it not?

A. That is the map—that is the map made by myself at that time.

(Testimony of J. J. Oberbillig.)

Q. And what are the next two documents?

A. Those are—those are photostats that I got from the Hennessey—had them made for the Hennessey property and it would give Mr. Picco a more clearer idea of the location, is that right?

Mr. Picco: It wouldn't give me a more clear picture.

Mr. Carver: Now if the Court please, these we offer into evidence as the detailed representation of the exhibit, particularly the Stibnite property, and then the detailed showing on the other two as to the Hennessey property—a bigger scale drawing of the Hennessey property.

The Court: I take it counsel for Respondent would be glad to receive it and would have no objection to it, is that correct?

Mr. Picco: I have no objection if it is for that purpose. [49] In other words, it explains Exhibit 3-C a little better?

Mr. Carver: That's all.

Mr. Picco: Because it won't be of too much help to me, because there is too much data on it.

The Court: Petitioner's Exhibit Number 11 is received in evidence. And I don't know whether the record shows that Exhibit Number 10 was received. It showed that the objection was overruled, but to be on the safe side, let the record show that Exhibit 10 was also received in evidence.

(Whereupon, Petitioner's Exhibit 11 for identification, witness Oberbillig, was received in evidence.)

(Testimony of J. J. Oberbillig.)

Q. (By Mr. Carver): Now directing your attention, Mr. Oberbillig to the period subsequent to the 1941 contract, and particularly in the winter of 1943—what, if anything, did your Corporation do to assist in the operation—participate in the operation of this Stibnite property?

A. In 1943, the Idaho Power had made the statement that it would be practically impossible for them to get electricity into Cinnabar and perhaps not into Stibnite. So, I was meeting with the President then, with that, and I told him that I would have—I would make arrangements to assist, so I put two big D8 Caterpillars on—never charged them a cent for it, and finished the highway and we had our wires and everything up for the Cinnabar Group, and then I took my Cats and went over on the Meadow Creek side, clear over to No Man (phonetic) and constructed that road and pole [50] line for the Idaho Power and the Idaho Power workmen had made affidavits to that effect, that I don't think are in this case. They were in the Bradley case, and all that was done without charge.

Q. So in the winter of '43, you did certain road work to build—on behalf of a transmission line?

A. That was all for the transmission line, and then, of course, I had done a lot of work on the Midnight Group, opening up ore in '23 and also—

Q. In '43?

A. I mean '43 and then '44, and even in '45, on the Smokey Ridge and those other groups on which Bradley had an option.

(Testimony of J. J. Oberbillig.)

Q. Describe what is the Midnight Group now? That's——

A. The Midnight Group lies on the east side of the Meadow Creek Group and is adjacent to the Meadow Creek—joins up with it.

Q. That is described in the 1941 contract under a separate option, is that correct?

A. Yes, but there was no charge made for the Midnight Group when it was put in.

Q. Now, what work did you do on the Midnight Group during this period then—what developmental work did you do?

A. I opened up ore with the Cats on that—on the original Midnight claim and also on the Garnet (phonetic) Creek claim.

The Court: Now, when did you do that? What year? [51]

A. That was in '23 and—I mean '43 and '44. It all linked together in those years.

Q. You were actually then, on the Midnight property, doing work at your expense on the Midnight Group? A. Oh, yes.

Q. Which was under option to Bradley?

A. Yes, sir.

Q. And the Bradley Company later took it over?

A. Yes, sir.

Q. Now, when did they take it over?

A. I think that deal was made in thirty—in '43—the fall of '43—I'm sure it was in the fall of '43. It might have extended into '44.

Q. Now, you had these Cats and what were they

(Testimony of J. J. Oberbillig.)

doing again? What work was performed? What type of work?

A. They done the building of the roads so we could get the material in to build the powerline.

Q. And with reference to the Midnight Group, what was done there?

A. That's where we crossed the Midnight Group—we crossed the Meadow Creek Group, we crossed the Midnight Group to get into the Cinnabar Group.

Q. But on the Midnight Group, did you do any developmental work?

A. Oh, yes, we run—the roads were run and we cut the ore [52] all along there on that ore structure there.

Q. Now, explain to the Court if you will what you mean by "cutting the ore"?

A. Well, opening it up, that's what that means.

Q. With what?

A. With the Cats—with a Caterpillar, you know.

Q. Just describe in some detail how that works, if you would, so the record will show that.

A. Well, we'd get on to the ore vein and plow out the ore to see how extensive it would be—we would have some way to figure out how extensive it would be. Now, I—

The Court: Was there an overburden or something on the ore that you removed with the—

A. Oh, yes, you know, and get it cleaned off. On Antimony Ridge, I entirely mined with the Caterpillar and took out—I think it figured something like a hundred and ninety thousand dollars.

(Testimony of J. J. Oberbillig.)

Q. Would you describe for the Court what the terrain is like on these groups? A. The what?

Q. What's the terrain like—what's the nature of the hills, are they steep or flat—what type of country is it? Give the Court a verbal picture of that?

A. Well, we were close—when we were digging out for that stuff on Midnight, we were very close to the top of the hill then, where it rounded off, and on both sides—Midnight was on the east [53] side and Garnet Creek was on the west side of the mountain, see?

Q. Was that land timbered? A. Huh?

Q. Was it timbered? A. Timber?

Q. Yes.

A. Oh, yes, there was timber in there, sure.

Q. When you were working those Cats, you were working in along those ores—

A. We'd open up, you know, wherever I found a fault line or something that had any showing of ore—some ore structure, we'd open that up. There's hundreds of places where ore is opened up on that property.

Q. Hundreds of places?

A. Hundreds of them, yes, and it was all done—

Q. You did that work with Caterpillar tractors?

A. In the early day—in the early day, we did it with a pick and shovel; but after we got a Caterpillar in there, these were Caterpillars, too, they were Eight Cats—D8 Cats—they were big Cats. They belonged to the United Mercury Mines.

(Testimony of J. J. Oberbillig.)

Q. In 1943 and '44, you had them working?

A. You betcha.

Q. Developing this property?

A. Yes, sir. [54]

Q. The Midnight Group? A. Yes, sir.

Q. You also had them on this road for this transmission line?

A. Yes, and also on the Antimony Ridge.

Q. Now, directing your attention to the year 1944, did there come a time when Bradley Mining Company put in a treatment plant at Boise for this tungsten ore that was coming out? Did that happen in 1944?

A. That happened in 1943. That was to leach and recondition the tungsten concentrates to upgrade it, you know, and it would bring a better price.

Q. That was a treatment process in connection with the ore? A. Yes, sir.

Q. Now, where was that plant built?

A. That was built on South Ninth Street, in Boise.

Q. And how far is that from the mine?

A. That would be right around a hundred and sixty-five miles.

Q. And how far is it from Cascade, Idaho?

A. Eighty miles.

Q. Now, with reference to that treatment plant in Boise, did your Company—United Mercury Mines Company, participate in the cost of construction of that?

A. Yes, sir, we paid two dollars and a half a

(Testimony of J. J. Oberbillig.)

ton from the mines to Cascade, on concentrates and from Cascade to Boise, five [55] dollars a ton. These figures are taken directly from the settlement sheets that Bradley furnished me.

Q. Was this amount outside and additional to the amount provided in the December 31, 1941, contract? A. Yes, very much so.

Q. Now, I believe you stated a moment ago that your Company, the United Mercury Mines Company, paid a proportionate share of the cost of that plant—how did you do that?

A. I didn't get that question.

Q. You stated a moment ago that the United Mercury Mines Company, paid a portion of the cost of the construction of that plant at Boise—that treatment plant—how did you do that?

A. It wasn't—the United never put a dime in that plant so far as construction was concerned, but after the plant was constructed and operating, the United was charged for the treatment there, and not only for the treatment, but also for the amortization of the plant.

Q. That's the point. They were charged for the depreciation of that?

A. Yes, and that's right there in these settlement sheets that they rendered.

Mr. Carver: May I approach the witness, your Honor?

The Court: You may.

(Petitioner's Exhibit 12, witness Oberbillig, marked for identification.)

(Testimony of J. J. Oberbillig.)

Q. Now, handing you what has been marked as "Exhibit 12 for [56] identification," I will ask you to state if that is one of the settlement sheets having to do with the purification plant at Boise?

A. Yes, sir.

Q. And for what year was that—what date was that—is that there?

A. This is November 14, 1944. Now, I will say in connection with this, that most of our '33 and '34 settlement sheets have been scattered around among the attorneys, you know, in the Bradley case, and——

Q. Now, just a minute——

A. ——I have been unfortunate in not locating it. The Court: You mean '43 and '44?

Q. '43 and '44? A. Yes; '43 and '44.

Q. Now, this shows a deduction for operating costs applicable, including depreciation—is that the item you are referring to? A. Yes, sir.

Q. Now, is this a representative settlement sheet handled in the same manner as the other lots for——were, for those shipments which went through the treatment plant in Boise?

A. Oh, there is a lot of these costs there, with not much more than the sales values is up here, of eighty thousand six hundred and fifty-five 0 nine—they are marked even up as high as nineteen thousand dollars cost——

Q. I don't mean representative as to size, Mr.

(Testimony of J. J. Oberbillig.)

Oberbillig. [57] My question: Is this the kind of settlement sheet——

A. They are all this way. They are just made by Bradley, they don't——

Q. And they all show a deduction for that depreciation? A. Yes.

Q. In effect, they were charging you for a portion of the cost?

A. I told Mr. Bradley that I would just as soon go along in proportion with my economic interests in any of the costs that he would have. Well, he says, "We're building up—we're going to put in a two thousand ton plant after the tungsten's out."

Mr. Carver: Now, if the Court please, this isn't the one I showed counsel, but the one I did show counsel is just like it. There are several representative ones. And I will offer it into evidence.

Mr. Picco: May I inquire a little? Mr. Oberbillig, I don't understand that first page, just how—what does that all mean? "Gross sales value per attached invoice, eighty thousand plus?"

A. Yes, now, they have a lot of other sheets, you know, that they put out, you know, and they was so ambiguous that I could hardly under——

Mr. Picco: Speak to the Judge, if you please.

A. I could hardly understand them, you know. But the only thing I can do is take this value and I made my kick about that. Well, Bradley always would say, "Go on—you might as well go along with us." And I yielded, because I wanted to see that operation move along. Well, you see, this is the

(Testimony of J. J. Oberbillig.)

absolute cost now, which [58] includes—see less operating cost, see? And that includes the—I can make that more clear to you if I had the complete sheet here to show, you know, just how they settled with us.

Mr. Picco: Well, what did——

A. This is an awful charge here.

Mr. Picco: You say you were charged something. Now, what did you pay there, according to that Exhibit 12?

A. This deduction, you know, takes out our royalty of five per cent out of this up here, see (indicating), and that is what was subject to royalty here, of seventy-three thousand eight hundred and seventy-three forty-five. Now, he had no right to make these charges, but I yielded. Now, I would have got five per cent on the eighty thousand six hundred and fifty-five—that is, my Company would. You see, that is definitely clear here.

Mr. Picco: As I understand this now, he is telling you by this Exhibit 12, that is, Bradley Company is, that the royalty you are to receive is seventy-three thousand eight hundred and seventy-three and forty-five cents?

A. That's subject to five per cent, see?

Mr. Picco: That's subject to five per cent?

A. Yes, but if he hadn't have taken this deduction here, it would be subject to the eighty thousand.

Mr. Picco: Now, you didn't have to send him any check in connection with that, did you?

(Testimony of J. J. Oberbillig.)

A. Oh, no, no; he run that his own way. [59]

The Court: That was taken out of your royalty, in other words?

A. Yes, sir.

The Court: Is that the idea?

Mr. Picco: It appears to be, your Honor.

Mr. Carver: That point—the point, for the information of the Court and counsel is that the royalty figure was computed after his bearing, by sharing in five per cent of the depreciation of the cost of this treatment process——

The Court: I see.

Mr. Carver: ——which was over and above, as will be seen from the contract itself—the terms of the contract.

The Court: Very well. Is there any objection, Mr. Picco?

Mr. Picco: No objection.

The Court: There being no objection, Petitioner's Exhibit Number 12 is received in evidence.

(Whereupon, Petitioner's Exhibit 12 for identification, Witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Now, you stated, I believe, that the same type of depreciation deduction was made on all of these settlement sheets?

A. On every one of them——

Q. For the ones in which the purification [60] plant——

A. Except there is a whole lot more added to a lot of them.

(Testimony of J. J. Oberbillig.)

Q. Now, Mr. Oberbillig, in connection with this transportation—did you pay—did your Company pay, outside and beyond the terms of the contract, the charge for the transportation of that ore to Boise——

A. Five dollars a ton.

Q. ——disproportionate to the amount of the actual cost?

Mr. Picco: I wonder if we could explain to the Court just what the contract provides for that—give him the full picture?

Mr. Carver: Yes, I think so. If the Court please, the contract calls for two dollars and a half transportation allowance for bringing the ore to the rail-head at Cascade. I am going to ask the witness, I will now:

Q. Now, what was the usual and normal cost of bringing ore from Cascade to Boise, per ton?

A. From Cascade to Boise?

Q. Yes.

A. Oh, right around ten dollars—fifty cents a hundred would be, you might say——

Q. You bore five dollars of that instead of five per cent, is that correct?

A. It was in excess of my proportion that I should pay.

Q. That's the point—you bore that additional by way of participating—trying to help this thing go along, is that correct?

A. Yes, sir; I was always ready to go with Bradley if he [61] wouldn't exceed that charge.

(Testimony of J. J. Oberbillig.)

Mr. Carver: Mr. Reporter, did that get through the noise of that truck?

The Reporter: Yes, sir.

The Court: Gentlemen, how much time do you think it will take to finish this case?

Mr. Carver: If the Court please, we are almost through with our direct examination.

The Court: Is this the only witness you have?

Mr. Carver: This is our only witness, yes, your Honor.

The Court: And how long do you think it would take for your cross-examination?

Mr. Picco: Well, I think at least an hour; maybe more.

The Court: Well, we will have plenty of time to finish this afternoon?

Mr. Picco: Oh, yes.

The Court: Well, we have the entire day for this so that we might as well recess now until 2:00 o'clock and finish up this afternoon.

(Whereupon, a recess was taken at 12:00 o'clock noon until 2:00 o'clock p.m., at which time the hearing reconvened, with the same parties heretofore mentioned being present.)

The Court: Very well, you may proceed, [62] gentlemen.

Direct Examination

(Continued)

By Mr. Carver:

Q. For the record, you are Mr. Oberbillig, pre-

(Testimony of J. J. Oberbillig.)

viously sworn. I just have two questions: Mr. Oberbillig, has the United Mercury Mines Company, with reference to the Hennessey Group and the other claims, the subject of this contract of December 31, 1941, at all times since 1941, paid its taxes and claims been allowed depletion based upon ownership of an economic interest in the ore in place?

A. Yes, sir.

Q. Beginning in 1921 and continuing down to the date of this hearing, has the United Mercury Mines Company at all times been an active mining company, actively engaged in prospecting, developing, and operating mines in the Yellow Pine Mining District of Idaho?

A. Yes, sir.

Mr. Carver: Your witness.

Mr. Picco: Thank you.

Cross-Examination

By Mr. Picco:

Q. I want to ask some preliminary questions on definitions, primarily, and the use of some of your words. You mentioned that you "blocked out" ores on the Stibnite group of claims in the '20's; you remember that, don't you, Mr. Oberbillig, in your testimony here this morning?

A. Yes, sir.

Q. What do you mean by "blocked out"?

A. That is—you block out ore—you get in on the vein, you see, on the ore itself and then you run a raise up on it and then [63] drift on it again, you know, see, and then, of course, you run a raise up through to the surface, even, if you got ore—or even if you have it on the surface, then you have a fine

(Testimony of J. J. Oberbillig.)

way to estimate the number of tons and to assay the value and you have got practically a correct—you got a pretty correct amount of value that's in all that stuff, you see?

Q. Now, in blocking out these ores in the '20's, actually what you had there were ore deposits of gold and antimony, is that right?

A. On Meadow Creek, yes, sir.

Q. No tungsten ore was discovered or developed in the '20's? A. When?

Q. In the '20's? A. In '20, you say?

Q. In the '20's? A. No; it was——

Q. In fact, there was no development or discovery of tungsten until the year '41 or '42, wasn't it—after the Government came in, the Bureau of Mines?

A. In '41 was when the tungsten was discovered——

Q. That's fine.

A. ——in commercial quantities, see?

Q. That's fine. I will ask a few more questions later on that. I just wanted to get that straight, that we are dealing with tungsten in this case, aren't we? [64] A. That's right.

Q. Now, I received the over-all impression from your testimony this morning that you personally did the developing and exploring of some of the mining claims in the '20's, is that correct?

A. I supervised the exploring all the way through. I have always had two or three men with me that I put them out, you know, on different

(Testimony of J. J. Oberbillig.)

prospects and different places where we wanted to work to uncover ore.

Q. Now, you were doing this personally, or were you doing it for the Corporation, or what were you doing?

A. I was doing it for the Corporation.

Q. Which Corporation?

A. United Mercury Mines Company and also previous to that, the United Mercury Mines Company come subsequent to other corporations that I had in there that took over properties.

Q. Now, the Bradley Company took over in 1927, didn't it? A. Yes; 1927—in August.

Q. Now, it wasn't known as Bradley Company then, was it? A. What?

Q. It wasn't known as the Bradley Company?

A. Known as the Yellow Pine Syndicate.

Q. And then later on it became the Bradley Mining Company, is that correct?

A. Yes; it become the Bradley Mining Company after October, 1930. [65]

Q. Now, you maintain that you did developing and exploration on these—on the properties in question here, after Bradley took over in 1927?

A. Oh, yes; I carried on various properties in there. I carried on—

Q. I am talking about the Stibnite properties, Mr. Oberbillig—the Stibnite properties?

A. Yes; I have.

Q. Now, you were doing that on your own, weren't you?

(Testimony of J. J. Oberbillig.)

A. When—after Bradley had taken it over, I—under my supervision, and a good deal of it was done personally, too—I located the Midnight Group.

Q. The Midnight Group is not the Stibnite property—I don't want to interrupt you, but I want to keep to the Stibnite property.

A. That was the Stibnite property then. That was under that lease and option.

Q. That was an addition—it was off of the property, wasn't it? It was not the same tract of property?

A. It wasn't the same ore zone, you know, or ore structure, but it was another ore structure that went to the southeast. And, you see, I worked all of that, you know, and located all of that property and I also located on the main structure, going north—see, the main structure—Meadow Creek structure runs north and south and I located all those claims in there. I done all the work for patented.

Q. Now, you are talking about the Stibnite [66] property? A. Yes, sir.

Q. Mr. Oberbillig, now, I didn't object to anything this morning, but I want you to answer my questions as directly as possible, because——

A. Yes, sir; I will.

Q. This was done on a voluntary basis, as far as you were concerned, was it not?

A. It was done for my Company—my United Mercury Mines Company.

(Testimony of J. J. Oberbillig.)

Q. All right; you had no business in there after Bradley took over, did you?

A. Oh, yes; I did.

Q. What business did you have in there, after Bradley took over?

A. My business in there was to see that this property was going to—this entire enterprise was going to be a success.

Q. Now, you were in there maybe—you had the right to go in and inspect, did you not?

A. Yes, sir.

Q. You didn't have any other rights under that contract, did you?

A. Well, I—I always felt, you know, that it was my duty to assist in there and keep others—if we were making a great success of it, to keep others away from the district, you see, in getting ahold of any property that would interfere with us. [67]

Q. And when you say you were working for the enterprise, you mean you were working for Bradley?

A. I was working for the United Mercury Mines Company.

Q. Didn't you, this morning, tell us that by "enterprise," you meant the Bradley concern?

A. Well, I meant the whole thing there.

Q. Now, it is true that Bradley took over possession in 1927, did he not? A. That's true.

Q. And he operated the Stibnite properties and the claims in the tract after 1927?

A. Well, after 1927, you know, I had the ore

(Testimony of J. J. Oberbillig.)

practically all developed, and the next thing was to do was to construct the road, to get the power a-going—United Mercury located all the power sites and we put in all those power plants, all under the United——

Q. Now, Mr. Oberbillig, I don't want to cut into you, but you are going beyond my questions all the time. And you are saying "we." After 1927, isn't it true that Bradley was in there operating these properties? A. Well, do you——

Q. Bradley was the one who installed the machinery, built the buildings, put in the generating plant, is that correct? A. That is correct.

Q. In fact, they owned all of the machinery and personal [68] property located on those mines—at those mines? A. But—but I was——

Q. I don't want your thinking—now, just—I have just asked you a question—you answer it. Now, if you have got something else, your attorney will get it out later on. A. All right.

Q. Now, as far as I understand your testimony this morning, as far as your going on those properties was concerned, you were personally watching over to make sure that Bradley was doing the right thing?

A. Well, I kept pretty close watch of the property.

Q. Actually, the Petitioner, the United Mercury, operated at a loss both of these years, did they not?

A. There was nothing else for them to do except to develop ore—see that we had commercial ore.

(Testimony of J. J. Oberbillig.)

Q. You don't—

A. It was estimated that on the United Mercury property at the time when the lease was given to Bradley that there was something like three million dollars of actually blocked ore.

Q. What I am saying is, the Petitioner Corporation operated in the red in the '20's and '30's?

A. From '20 to '30?

Q. In the '20's and in the '30's? In fact, you didn't get into the profits end of this thing until the war started, did you?

A. That's absolutely true. It was a developing proposition, [69] to get ore in sight.

Q. I want to ask you questions now as to as far as your relationship with the Bradley Company is concerned—although you have been telling me some of that. It was sort of a lessor-lessee relationship from 1927 on, wasn't it? Your Company was the lessor and Bradley was the lessee, or the optionee?

A. It was the optionee.

Q. And Bradley Company was operating and working the mines in that—

A. That's right.

Q. And this has to do with the properties that are involved here, the Stibnite properties?

A. Yes; all of the properties in there.

Q. Now, that relationship changed in 1949, did it not? A. 1939.

Q. In '49? A. In '49?

Q. In '49—I'm sorry, 1941. In 1941, did the Petitioner sell the Stibnite property to Bradley?

(Testimony of J. J. Oberbillig.)

A. In 19—do you want me to explain that?

Q. Just answer yes or no to it?

A. Well—

Q. Did you deed over the properties to—deed over these mines and all that property to Bradley in 1941, pursuant to the agreement of December 31, 1941? [70]

A. I certainly did—that is, the United Mercury did.

Q. Title passed to Bradley at that time?

A. Title passed to Bradley, except—

Q. Yes?

A. —the economic interest held by me—I mean by the United Mercury.

Q. United Mercury, the Petitioner, ceased to have any interest in that property after 1941?

A. What about its economic interest?

Q. Except for the right to payment, is that correct?

A. Yes; that's correct.

Q. Thereafter, the time and manner of mining was in the sole discretion of Bradley, wasn't it?

A. That is correct.

Q. In fact, it was in the sole discretion of Bradley before 1941, wasn't it?

A. Oh, no.

Q. You never did operate those properties, did you?

A. I never took—

Q. I am talking about Stibnite?

A. I never took out any ore out of them except to throw it out on the bank—to develop ore, that is all I ever did on that property.

Q. Petitioner Corporation did not develop—did

(Testimony of J. J. Oberbillig.)

not extract any of this ore before or after the 1941 agreement, that is correct, [71] isn't it?

A. Not the—for the purpose of milling or reduction work, see?

Q. I don't want to repeat this, but Bradley furnished all the tools and the equipment, built the buildings, power plant, owned all the machinery and so on that was taking place there, is that correct?

A. I turned—when I made the deal, I turned over a lot of tools and a lot of equipment that I had in there, and all that went with him, and I even turned the pack string and everything over to him.

Q. That was in 1927? A. Yes.

Q. Now, we have stipulated paragraph six of the stipulation, and you are aware of it, that Bradley operated and worked the Stibnite properties, and extracted, transported, marketed and sold the ore, you remember that, don't you? A. Yes, sir.

Q. Now, Bradley hauled the ore to the railhead in Cascade, Idaho, isn't that right?

A. That was the railhead.

Q. That was quite a long trip, wasn't it?

A. Eighty miles.

Q. And treated the ore, getting ready—before sale—now, how did they do that in '44? [72]

A. In 1944? The tungsten was mined and put in the reduction plant, which was a wonderful plant at that time.

Q. Was that right there on the——

A. On the grounds.

(Testimony of J. J. Oberbillig.)

Q. —on the property—that was Bradley's reduction plant?

A. Yes. Then that ore was turned into a concentrate; then the concentrates were hauled to Cascade or directly on to Boise to the purification plant.

Q. Now, Bradley did all of this, did he not?

A. That's very——

Q. It got the purchasers, it extracted the ore for sale, it did everything in connection with mining—with the operations of these properties—of these mines on the properties? A. Yes, sir.

Q. Now, I want to ask you some questions about the Bradley Mining Company. You were quite familiar with the set-up there, weren't you?

A. Very familiar with it.

Q. It was a California concern?

A. Yes, sir.

Q. Do you know something about its financial background?

A. I know that in 19—right along around 1941, they were very hard up.

Q. It was a large company, wasn't it?

A. Quite large. [73]

Q. It was a multi-millionaire—multi-million dollar corporation? A. I hardly think so.

Q. Do you know—whether they had spent a lot of money—invested money in the mines there on the Stibnite properties?

A. They had spent a considerable sum along, as they went from '27 up to '41.

(Testimony of J. J. Oberbillig.)

Q. Would you say they spent about five million dollars in developing that property?

A. No; oh, no. No. In the development of the property, and in the actual disclosing of ore, I doubt whether they spent as much money as I did for the United Mercury, up to that time, now, see?

Q. Now, you just answer my questions. You are always going a little beyond them, but I will bear with you if you will bear with me. They had quite a few million dollars invested in property though, did they not?

A. When the '41 contract was made, we, all of us knew that they were very hard up, so I——

Q. They had been through the '30's, had they not?

A. They didn't have as much money as a lot of them probably thought they did.

Q. Actually, Mr. Oberbillig, it took a pretty big outfit to try to mine anything in that area, as I understand your testimony this morning? [74]

A. Well, then I must have had a pretty big outfit, too, then.

Q. All right; I am asking you, isn't that the reason why you didn't operate these properties?

A. I had—it cost me money to operate there.

Q. I understand—you didn't operate these properties because you didn't have the capital to do it?

A. I—the only thing I could do with those was to disclose ore.

Q. Now, you still maintain that United—United

(Testimony of J. J. Oberbillig.)

Mercury, the Petitioners, spent large sums in developing the Stibnite property?

A. You mean the Bradley?

Q. Bradley properties, yes.

A. Yes. Well, they had a considerable money—they had to spend a considerable money in the way of water power, building of roads—there wasn't any roads in there all the while I developed it, and no power whatever. And there was two little power plants in——

Q. I mean, if Petitioner spent any money in there, it was done before 1927, wasn't it?

A. It was a what?

Q. If you spent any money developing those properties, it was done before 1927?

A. Some of it was.

Q. Most of it?

A. Well, the biggest part, yes. [75]

Q. In fact, all of it was done before 1927, wasn't it?

A. Oh, no; I had done a lot of work on Antimony Ridge; I done a lot of work on—on the Smokey Ridge; I done a lot of work on the Sun (phonetic) Group. Bradley never even drove a pick in on that and he had the option on it.

Q. Actually, it was too expensive to operate the property for the Petitioner, and that is the reason why you had Bradley take it over, isn't that right?

A. Well, you know, it is customary after you get a mine developed, you have——

Q. I mean—I just want you to answer yes or no

(Testimony of J. J. Oberbillig.)

on that. That's the reason why you turned it over to Bradley, wasn't it?

A. Because I did not have sufficient money, and that is the position that Bradley was in in '41, and I told Mr. Bradley when I made that deal, that "I'll go with you and I'll give you a deed to the property so you can raise some money so we can get this property going now. We got tungsten here, and we need it." Isn't that correct?

Q. I don't know if it is correct. You are the one that is testifying.

A. No; no, is that what you wanted me to say?

Q. No; I just want you to answer my question, if you please. Some of these remarks are going beyond my questions. I am interested in that statement you made this morning about how much you did pay in the way of development expenses. What did you say [76] you paid in the way of development expenses—I am talking about the Petitioner?

A. The property and the development work—for me to make a true statement, must have run around seven to eight hundred thousand dollars.

Q. How much?

A. Over seven or eight hundred thousand dollars.

Q. Where did you get the money?

A. Where did I get the money? Some of it out of the ground. I spent money that Bradley paid.

Q. Now, you operated at a loss all throughout those years, the '20's and the '30's—

A. Sure, but we had—

(Testimony of J. J. Oberbillig.)

Q. —and you had everything spent in 1922?

A. We had no production.

Q. Well, I mean you did have it all spent in 1922, did you not? A. In 1922?

Q. That's correct.

A. Oh, well, I am speaking about all the way through until now.

Q. What I am speaking about is how you got the money to throw into these properties in the '20's and '30's, as you have been testifying. Now, do you agree with me, do you, that you didn't have any money at all by 1927? [77]

A. In 1927, I owed around thirty thousand dollars.

Q. I am not talking about you, personally. I'm sorry—I mean Petitioner?

A. I'm talking about Petitioner, too. I always get myself mixed up into that.

Q. Now, isn't it true that all of the money that you had raised by selling stock in the Corporation had been invested by 1922?

A. Not by 1922, but it was by 19—by 1927.

Q. It was invested by that time?

A. Oh, yes.

Mr. Picco: Well, I will put this in for what it's worth. I don't know how we are going to do this, your Honor. I think we can get what I want in there. I think it might be a good idea to just identify this as Respondent's Exhibit for Identification, but I am not going to turn it in—I am not going to offer it now.

(Testimony of J. J. Oberbillig.)

The Court: Very well. What is that, a book—do you want to describe the whole book?

Mr. Picco: These are the corporate records—the corporate minutes of the Petitioner here.

The Court: Mark the book.

Mr. Picco: I will not offer this in evidence because we——

The Court: You will read certain pages, is that it?

Mr. Picco: That's correct.

The Court: Very well. [78]

The Clerk: Exhibit F for identification.

(Respondent's Exhibit F, Witness Oberbillig, marked for identification.)

Q. Now, I show you Exhibit F for identification, which are the corporate minutes of the Petitioner, and I particularly direct your attention to the corporate minutes of December 14, 1922—the minutes of the Board of Directors, on page a hundred and eighty of the corporate minutes book, and that purports to be a financial statement of United Mercury Mines at the close of business on November 4, 1922, is that correct?

A. That would be correct, sir.

Q. Now, looking down over the assets, you have how much in the way of assets here?

A. That is—I can't see that there.

Q. One million one hundred and forty-two thousand nine hundred and eight dollars?

A. Yes.

(Testimony of J. J. Oberbillig.)

Q. Now, you look at your liabilities side of this balance sheet and you will find that all of this is—all of these assets reflect the capital stock and the surplus, is that correct? A. That's correct.

Q. Now, you never got any other money except what you had in here in the way of capital stock in selling it, isn't that right?

A. Up to that time.

Q. That's right. Now, you had invested all that money by [79] 1922, wasn't it?

A. Well, this was, yes, by 1922.

Q. Now, in looking over this balance sheet, it shows that you have invested in various mines. Now, did you have stock in those mines?

A. These were twelve companies—twelve companies that were organized previous to the United Mercury Mines Company and when these books were audited, these figures were taken there, on that, and I think that these stocks and everything were figured at the par value and put down here on that basis.

Q. The balance sheet shows that you had a cash balance of two thousand one hundred and fourteen dollars and forty-three cents at the end of 1922?

A. That's when—that's when United Mercury took over all these properties.

Q. Yes.

A. These properties were all turned and that is the reason that the United Mercury then incorporated, to take over all of these properties, and it took over all the—and I suppose that is about the

(Testimony of J. J. Oberbillig.)

only thing, when they balanced out that account, the only thing they could do.

Q. Well, actually, what I want you to answer is that by 1922, you had actually spent all the money in that Corporation, and you had all these various mining claims throughout Valley County, Idaho, didn't you? [80]

A. Oh, no; I had quite a few mining claims, that's a cinch.

Q. You didn't have any other cash for developing in 1922, did you?

A. Nothing any further than what I could raise by the sale of stock, but after 1922, I raised considerable money selling stock.

Q. How much did you raise?

A. Well, I went to Oregon and got some people interested there, who put up about eighty thousand dollars in stock—in money, that is United Mercury Mines and by along about 1924, '25, I had around four—three, four hundred thousand dollars invested—I mean, invested in these properties.

Q. Now, as you went along in the '20's there, what—1926, 1927, you found it advisable to sell all or part of your mining claims, because you didn't have enough to operate, isn't that right?

A. That is true. Because, I will tell you, you know, those things are done in a mining way—people will go out—you probably would be glad to go out if you thought you could locate a mining claim, and do a little work on it, and then have somebody come in and buy it off of you.

(Testimony of J. J. Oberbillig.)

Q. I don't question that at all. I believe that. Now, what——

A. That is just where I was.

Q. In other words, you were looking around for somebody to go in and operate these properties and to develop these properties for you? [81]

A. I would be happy had I the money to have gone ahead with that, and I would have been very happy to have gone ahead after we struck the tungsten.

Q. Actually, by looking through the books, you find that you had unsuccessful negotiations trying to sell to the Hexma (phonetic) Mining Company—you remember that, don't you?

A. That was one of the companies, yes.

Q. You actually ended up doing business with Bradley in 1927? Your negotiations to transfer these properties and have them operated were successful with Bradley in 1927?

A. Ever since Bradley has taken over the property, there has never been any negotiations carried on with any other company except with the Bradleys.

Q. Now, as a matter of fact, the development of the Stibnite properties was made by Bradley, wasn't it? A. On the Stibnite property?

Q. That is correct.

A. Why, man, I had——

Q. I am just asking the question. You can say no if that is the answer.

A. All right, no; Bradley didn't do it all.

(Testimony of J. J. Oberbillig.)

Q. Wasn't it—didn't Petitioner acknowledge or in some of the stockholders' meetings, from time to time, from 1927 to 1941, and even in the agreement, that the Stibnite properties were to be developed by Bradley? [82]

A. He was to spend so much money to keep up the work, and now, when you come to that, if you went me to explain that, they had the Cinnabar Group and, of course, at that time, Bradley didn't have any too much money, so he asked me to go down to where the tungsten strike was made and lay out the work so that the assessment work could be done on the Cinnabar Group, and to lay it out so that it could be done on the Monday and Meadow Creek Group, which was a mile and seven-tenths, you see, before you got to Meadow Creek.

Q. Now, you did this personally, but you didn't spend a dime of your money in doing that, did you?

A. I done it for Mr. Bradley—I done it for United Mercury Mines Company—done it for the enterprise.

Q. Actually, in the 1927 agreement, you obligated Bradley to spend twenty-four thousand dollars every year in developing those properties?

A. That's true.

Q. And they spent twenty-four thousand dollars every year from 1927 on through to 1939 and to '41—in fact—is that correct?

A. That's correct.

Q. In fact, in the 1939 agreement, didn't you obligate him to spend twenty-five thousand dollars a year?

(Testimony of J. J. Oberbillig.)

A. That's true, but I want to tell you now, Mr. Bradley spent at least a hundred thousand dollars a year from '27 to '33. He exceeded the amount of his contract. [83]

Q. In fact, the purpose of giving the options to Mr. Bradley and his corporation from 1927 on, was to actually cause the development of those properties?

A. It was to get those properties into production. They were practically developed.

Q. Well, I want to refer you again to—I don't think we are on this one at this time—let's identify this as the next number for the Respondent.

The Clerk: Exhibit G for identification.

(Respondent's Exhibit G, Witness Oberbillig, marked for identification.)

Q. I want to hand you Respondent's Exhibit G for identification (hesitating)——

The Court: Somebody should tell the Court what that is.

Mr. Picco: I am going to get to that in a second, your Honor.

Q. Now, this Respondent's Exhibit G purports to be a continuation of the corporate minutes of the Petitioner. that's correct, isn't it?

A. That's correct; yes, sir.

Q. And it is that? A. Yes.

Q. Now, I want to direct your special attention to the corporate minutes of January 13, 1943—that involves a meeting of [84] the Board of Directors—

(Testimony of J. J. Oberbillig.)

if you would just verify that that is correct, as we are going to be dealing with this record. I am sorry I can't present this entire exhibit, as it is too bulky.

A. This is an annual stockholders' meeting, is that what you wanted?

Q. That's correct. It is January 12, 1943, isn't it?

A. Yes, sir.

Q. Now, I want to go along here and point out one statement made in here in the way of a resolution. I want to read it so it will get into the record.

A. All right.

Q. This resolution states—this corporate minutes of January 12, 1943, which is Respondent's Exhibit G for identification reads in part as follows—this is a part of the resolution: "Whereas, the United Mercury Mines Company, since the year 1927, has had certain of its properties under an option to Fred W. Bradley and corporation organized by him, and the purpose of giving that option was to cause a development of the claims described therein for the purpose of paying to the stockholders, their investments in said United Mercury Mines Company." That's correct, isn't it?

A. That is true; yes, sir.

Q. So that actually the reason why these properties were transferred—the Stibnite properties were transferred to Bradley was to cause the development of the properties? Is that correct?

A. That's correct, yes; and to take care of the assessment work. [85]

Q. Now, I am going to ask a question about the

(Testimony of J. J. Oberbillig.)

mineral explorations on the Stibnite after 1941. Did you mean to claim credit this morning in your testimony, for finding tungsten ore on the Stibnite property—is that the impression you want to leave with the Court?

A. What date is that you got there?

Q. I don't know what page it is on—I am talking about your testimony this morning.

A. I know, but didn't I give some date there, or didn't he ask me——

Q. I think it was around—1941 or '42.

A. Well, in 1941, it was through my work that the tungsten was discovered and where that tungsten lied on that property, there never would have been a Stibnite today had it not been for the efforts of the United Mercury Mines Company to persuade the Government to go in there and drill the property for strategic minerals.

Q. Did you spend any money in connection with that?

A. I certainly spent quite a little money in connection with that.

Q. Did the Petitioner spend any money?

A. What's that?

Q. The Petitioner?

A. The Petitioner, yes, sir.

Q. At that time, Bradley was in possession of the Stibnite properties, wasn't he—wasn't the Bradley Company in possession of [86] the property?

A. After I—after I got the Hennessey property

(Testimony of J. J. Oberbillig.)

for him and got it back to him, and got it back into the enterprise—into the Bradley enterprise. That's when they spent the money on it.

Q. It belonged to them or you wouldn't have been giving it to them, isn't that right?

A. Oh, let me tell you—they threw it back to Hennessey and I purchased it from Hennessey.

Q. Do you want this Court to believe that you had millions of dollars in tungsten in your pocket and you turned it over to Bradley because you were kind-hearted?

A. Absolutely true, and I want to make that statement. That was my—that was the only ambition I had at that time, to see a success in that country.

Q. Now, Exhibit 9—this is the agreement which permitted the Bureau of Mines to come into the picture. Now, the Bureau of Mines did this for nothing, did it? It didn't charge anybody anything to go in there and drill. They were thinking about the United States, I take it, at that time, and the possibility of war, isn't that it?

A. So was I.

Q. And so was Bradley?

A. No; Bradley didn't give it a thought. Bradley would have run us all off if he had a chance.

Q. Well, I don't understand, really, and if you have the answer to it, I'd like it—I think you did answer it. If Bradley was—if [87] Bradley Mining Company was as bad as all that, why you turned over this tungsten that you found there at that time? You don't have an answer?

(Testimony of J. J. Oberbillig.)

A. I told Mr. Bradley—one of his attorneys, and he says, “Well,” he says, “I appreciate all that.” “Well,” I says, “I’d rather deal with the Devil I know than the Devil I don’t know.”

Q. Actually—I direct your attention to the Petitioner’s Exhibit 9, which is the agreement with the Bureau of Mines for a minerals explorations.

A. This was the second one that they made out.

Q. This was signed by United Mercury, by yourself?

A. And Bradley.

Q. And by Bradley. Now, the signature of Bradley was absolutely necessary on this thing, is that correct?

A. Well, in order to permit him to let us drill. It wasn’t—

Q. You want the Court to believe that Bradley was against this thing—he was against finding tungsten on this—

A. Yes, and I have—

Mr. Carver: I don’t like to interrupt counsel, but I don’t think it is proper cross-examination to ask this witness what he wants the Court to believe. We are trying to get at the facts.

The Court: Well, this is cross-examination. He has a good deal of leeway in the examination of this witness, and the witness either doesn’t understand or seems reluctant to answer. [88] Let’s speak right out and tell the Court about this, if you understand what he means.

A. I do understand what it means. It was in 1940 when the Government moved over there to drill the Hennessey Group, and Bradley objected to it,

(Testimony of J. J. Oberbillig.)

so they went over to another property that was owned under my supervision. That was what we called the Sugar Creek Group, and they drilled there that year and finally, by 1941, we got him in the notion of drilling, because we opened up—went through a lot of ore and found that the drilling was really an essential thing to discover and develop ore.

The Court: Then it was necessary to get his signature before you could drill on his property then?

A. What's that?

The Court: He had to sign this agreement before you could drill on this property?

A. Oh, yes.

Q. Now, I ask another question. You stated this morning that the discovery of this tungsten deposit occurred some time in October of 1941, is that correct?

A. No; I said in July or August.

Q. Oh, yes. Now, I am anxious—I would like to get—I would like to ask this question: Were they sure that they had tungsten discovered in August of 1941, before this agreement was signed? Before the agreement that is Exhibit 4 in this case?

A. What is the date of that? That was '41? [89]

Q. This was thirty—September of '39, this thing here.

A. Huh?

Q. September, '39.

A. Yes; that is when we first started out and it was signed though, a year after that, by Bradley.

Q. You testified this morning there was bad re-

(Testimony of J. J. Oberbillig.)

lationship between the Petitioner and Bradley Mining Company. In fact, you—did you not testify that way this morning?

A. Not that it was bad relationship, but I testified that Bradley closed up the Meadow Creek Mine, and he had no right to close it down except to beat that fellow out of his royalties that went to work and put that field on its feet.

Q. Petitioner was trying to forfeit this agreement at this—at that time?

A. Well, if Bradley hadn't gone to work and hadn't gone down on the East Fork deposit, that is the Hennessey Group, we certainly would have done something, and he understood that, too.

Q. At any rate, on December 31, 1942, Petitioner deeded over its property to the Bradleys?

A. That's true.

Q. Now——

Mr. Carver: '41, you mean?

Q. '41? A. '41.

Q. I say, could you not have been mistaken about the [90] discovery of tungsten deposits on that property and wasn't the discovery actually in 1942? A. No; the discovery was in '41.

Q. Then you——

A. Now, I will make that clear.

Q. That won't be necessary. You have answered my question. You want your answer to stay that you turned over this tungsten to Bradley Mining Company? A. I sure do.

Q. I want to try to get into your testimony of

(Testimony of J. J. Oberbillig.)

this morning as to transportation—transportation costs. I am not so sure that I received what you had in mind. Did you testify that you shared in the transportation costs—was that the essence of your testimony this morning, or were you testifying that you participated in the transportation of the ore to market in 1944?

A. I participated in the transportation and paid my—I paid in excess of my economic interest.

Q. That is what you meant—that was the impression you meant to carry this morning?

A. That's right.

Q. Now, actually you have nothing to do with the transportation of that ore, did you?

A. Not—nothing that I know of, no.

Q. Neither you nor the Petitioner—you didn't perform any service whatsoever in connection with transportation, did you? [91]

A. Except to allow him to make the charges for that transportation.

Q. As far as transportation, that was Bradley's affair, wasn't it?

A. I don't—I know, but not the charges of it. He had no—

Q. Answer my question.

A. Oh, yes; that's correct.

Q. And as far as—as to whom he transported, that was his business? Now, what I am trying to say, you didn't have any right to tell him anything about transportation, did you?

A. Why not didn't I?

(Testimony of J. J. Oberbillig.)

Q. I am asking you that question.

A. Yes; I did.

Q. What right did you have to tell him anything?

A. He was violating the contract when he charged me and took those out of my royalties. Why, he charged me even for the amortization of the plant. It is right there on those statements.

Q. You are wanting to say that Bradley was forcing something down your neck in violation of that contract?

A. Certainly he was, at the time when he was making those charges.

Q. Now, the contract called for your sharing in some of those expenses?

A. That was in the two dollars and a half. He worked that out [92] of me, too.

Q. He didn't work it out of you. You signed the agreement, didn't you?

A. Sure I did, after we agreed to that.

Q. You want the Court to believe that there was no modification of that agreement from two dollars and fifty cents to five dollars?

A. I would like to have the Court believe that I yielded there to pay that two dollars and a half.

Q. You didn't have to——

A. In order to keep things going.

Q. All right, you did that out of the generosity of your heart?

A. I did that for my Company.

(Testimony of J. J. Oberbillig.)

Q. I understand that Petitioner was paid five per cent of the net revenue?

A. The contract said five per cent of the gross.

Q. Five per cent of the returns?

A. Of the net smelter returns.

Q. Now, actually, isn't it true that you were sharing part of the cost of all this operation—if you were just getting five per cent of the net return?

A. I was sharing a great deal of it right along.

Q. But you are not contending, are you, that you were participating in the operation?

A. What would that be, if it wasn't operating—if it wasn't participating in the operation? [93]

Q. Well, I am saying it to you. You have got to answer.

A. Wouldn't that be clear enough, if I was paying for hauling out ore and paying for reduction of the ore? That all comes under the head of general mining, doesn't it?

Q. Are you asking me questions? A. No.

Q. It's true that you were sharing part of the cost of transporting the ore pursuant to the contract—that's correct, isn't it?

A. That's correct.

Q. But it is not true that you had anything to say about how that ore was transported?

A. Well, now, I think I had a right to put in a kick there just the same.

Q. Well, I want to take you now to the—your sharing in the cost of the treatment process. Will

(Testimony of J. J. Oberbillig.)

you please tell us again what you meant by that? You testified about the treatment process. Was that in 1944? A. That was in 1944.

Q. Now, how was that done? Will you explain the process there? A. Yes; the——

Q. Bradley installed or erected a plant in Boise, Idaho, is that right?

A. Yes; it was a leaching plant; they called it a purification [94] plant. That was to upgrade the tungsten concentrate so that they—now, the more tungsten that you could get in—higher grade content, you see, the more you would get out, or a better price you would get. It——

Q. That was part of the cleaning process. You cleaned that ore and make it a little better, and that is just part of sales, isn't that correct, too——

A. To make it more salable.

Q. Now, you testified that you shared in the cost of the cleaning process? A. Yes, sir.

Q. Now, that was pursuant to contract, too, wasn't it?

A. That was in violation of the contract, because the contract didn't make any such statement.

Q. Now, you didn't mean to imply that you were participating in the cleaning operation, were you, this morning?

A. Whenever—yes—whenever I had to pay that share, and I yielded to him—I says, "All right, I'll go with you," and he promised that when the tungsten was depleted, which the drill bit, you know, would show that the tungsten would soon be mined

(Testimony of J. J. Oberbillig.)

out, and we had made a good enough showing to put in a two thousand ton plant, and he says, "We're going to put it in." Now, the records will show that he went ahead on that, and we had the two thousand ton plant.

Q. You don't want to leave the impression that anybody but [95] Bradley conducted the cleaning process in Boise, Idaho?

A. It was only Bradley that conducted that.

Q. All right; I think we understand each other. Now, I want to go over your testimony as to the construction of some road in the area. I think you said 1943 or 1944, is that correct?

A. What is the royalties about?

Q. The road; the road.

A. Oh, the road? Well, that road was to assist the Idaho Power. Equipment was very scare at that time, and I had the two large D8 Cats—Caterpillars. Now, I took them over after I had finished all the work—get the line in for the Cinnabar Mines from Bradley, and here we were stuck then for power, if this work hadn't been done between Meadow Creek and the Johnson Creek, where the power-line came, and I put my two Cats on there and run there for nearly six weeks. And I never charged—

Q. Now, was this in '43 or '44?

A. That is—huh?

Q. 1944 or '43?

A. That is the fall of '43, when we got the power in.

(Testimony of J. J. Oberbillig.)

Q. Now, are you—were you saying this morning that this road was for the particular benefit of Bradley?

A. That was absolutely for the particular benefit of Bradley and the Cinnabar Group.

Q. You want the Court to believe, do you, that again Petitioner is coming into the picture and helping Bradley out with its [96] own affairs, is that it?

A. That's true.

Q. Weren't you operating at the same time?

A. What's that?

Q. At this time, weren't you operating on another tract?

A. I was operating on the—I had a—we were co-partners in the Cinnabar Group.

Q. That is the Bonanza—

A. The Bonanza Group, yes.

Q. You were also operating the—

A. Antimony Ridge.

Q. Antimony Ridge? A. Yes.

Q. Now, this road that was being constructed for Idaho Power—wasn't that of some particular benefit to your own operations on those two tracts of land?

A. Why, sure, it had something, because we wanted the power at Cinnabar, too.

Q. And isn't that the reason why you were in there with your two Cats?

A. No; because I was co-operating to get that power in there.

Q. Now, as a matter of fact, Bradley was in there co-operating, too, on this thing, wasn't he?

(Testimony of J. J. Oberbillig.)

A. Well, yes, but he didn't have any equipment.

Q. You mean that Bradley didn't have any [97] equipment?

A. No equipment to put on that road. That is absolutely true.

Q. Now, you incurred some expenses in connection with that, did you not? A. The what?

Q. You incurred some expenses in connection with these Cats? In connection with improving the road or whatever you were doing for Idaho Power?

A. My drivers that was driving on the Cats boarded there at Bradley, and——

Q. Bradley was giving them board and room?

A. Yes, he was—wait a minute, now. They boarded there and after we had the road and had the power in and everything, Mr. Bradley sent me a bill. I think it was for something like a hundred and sixty dollars for the board for those men, and I handed it over to my alleged lawyer, that was Mr. Worthwine (phonetic), and he said, "Give me that bill," he says, and he took the bill, and that is the last I heard of it.

Q. You never paid anything?

A. That's co-operation, you know.

Q. You never paid anything? A. Huh?

Q. You didn't incur any expenses actually, did you, in connection with this road?

A. We, the United Mercury, paid it all. [98]

Q. I am saying—how did you pay it?

A. How?

(Testimony of J. J. Oberbillig.)

Q. That's right.

A. I paid the bills for the United Mercury.

Q. How did you deduct it—did you deduct it in Petitioner's income tax return?

A. I don't remember. I don't know about that.

Q. Now, could I have the Deficiency Notice? (Paper handed.) Now, I direct your attention to the Deficiency Notice on file in this proceedings, page two of that Deficiency Notice, and I want to read one of the adjustments that were made here (reading): "Loss claimed on Antimony Ridge operation is decreased in the amount of two thousand five hundred dollars to disallow construction of road for Idaho Power Company line." This is for 1944. Now, could this be what you are referring to?

A. No; that work was done in '43.

Q. What work was that—what work was done in 1944 for Idaho Power Company?

A. I don't recall of any that was done in—

Q. Well, then, it is conceivable that this—

A. This—the auditors must have taken this one and got mixed up on that, because in '44, I done a lot of work on Smokey Ridge and Sun Group, and Bradley had an option on them at that time.

Q. And what you are saying is that it was probably '43, but the expenses were taken in 1944? [99]

A. Well, I wouldn't know about that.

Q. Now, actually, there were expenses taken in connection with Idaho Power Company line—but you took that in connection with the Antimony

(Testimony of J. J. Oberbillig.)

Ridge operation. What I am saying—this line—this road benefitted the Antimony Ridge operation, did it not?

A. No; no, I am getting power put in now for Antimony Ridge, and that power is three-quarters of a mile from there.

Q. Would you please explain to the Court why you claimed two thousand five hundred dollars in connection with a loss on the Antimony Ridge property for that very same thing in 1944?

A. I have to confess that I don't understand; I don't know anything about that.

Q. Do you know whether you took that deduction in the income tax returns for 1943?

A. I'll tell you where that charge might be made on account of Antimony Ridge. That's the road that I constructed from Johnson Creek, up the Golden Gate Group, which is a part of the Antimony Ridge Group, and that is the place where I recent—after Bradley turned back the property, I recently made a big strike up there for tungsten.

Q. Well, if you had incurred an expense in connection with this road in 1943, you would have taken the deduction in the income tax return, is that correct?

A. Well, I think so.

Q. Now, in what connection would you have taken that, as to [100] the income you received from Bradley?

A. It would have to come from there.

Mr. Picco: I want you to mark this Respondent's Exhibit—

(Testimony of J. J. Oberbillig.)

The Clerk: H for identification.

(Respondent's H, Witness Oberbillig, marked for identification.)

Q. I hand you Respondent's Exhibit H for identification, which purports to be the petitioner's corporation income tax return for 1943, and ask you if that is your signature at the bottom?

A. That is my signature.

Q. And what is this document?

A. Well, I just couldn't tell you. I think that is the——

Q. That's the return for 1943, isn't it?

A. 1943—the return for 1943—they make those things out and I sign them.

Mr. Picco: Are you willing to stipulate that the money that was incurred in connection with the road for the Idaho Power Company was incurred in connection with the operation of Antimony Ridge?

Mr. Carver: No; I am not willing to do that. I am willing to stipulate that that twenty-five hundred dollars is this road work.

Mr. Picco: I'm not going to stipulate that. I offer this [101] in evidence, your Honor.

Mr. Carver: To which we object. I don't see the relevancy. I don't understand at this time what counsel is getting at.

Mr. Picco: He tells me that he incurred some expense and he probably took it off on his income tax return, and I want him to look at this income tax return and tell me where he took it. If he did

(Testimony of J. J. Oberbillig.)

take it. In other words, if he made——

The Court: To be sure of whether or not it was taken in '43?

Mr. Picco: That's correct.

Mr. Carver: I don't think there is any question, counsel, but what that item occurs in this '44 return.

Mr. Picco: Which item?

Mr. Carver: The twenty-five hundred dollars.

Mr. Picco. That is in connection with Antimony Ridge. You have no objection, do you, Mr. Carver?

Mr. Carver: I have no objection.

Mr. Picco: I move this into evidence.

The Court: Very well, Respondent's Exhibit—what is the exhibit number?

The Clerk: H.

The Court: Respondent's Exhibit H is received in evidence. Do you desire leave to withdraw the original and substitute photostatic copy?

Mr. Picco: Yes, if you please. [102]

The Court: Leave is given to withdraw the original and substitute photostatic copy therefor.

(Whereupon, Respondent's Exhibit H for identification, Witness Oberbillig, was received in evidence.)

Q. Thank you. Mr. Oberbillig, I appreciate that you are not too familiar with this, but this is the Respondent's Exhibit H, which is the 1943 return of the Corporation, and I just want to point out one or two things here and then ask you questions—now.

(Testimony of J. J. Oberbillig.)

there is a schedule here, an analysis of your expenses in connection with the operation of the Bonanza Mine—you were operating at that time on that, joint operation with Bonanza?

A. That's right.

Q. You have got "road maintenance." Could you have meant that when you mentioned about the expenses you incurred in connection with the operation of the road in the fall of 1943? If you don't know, just say you don't know.

A. I was just trying to think, you know. In the wintertime, we have to spend a considerable money, you know, and that year, we had some very heavy snows, and I had to send my Cat all the way through from Johnson Creek, you see, way up to Bonanza, and we worked on that.

Q. Sure.

A. Now, the same way happened this year, you know. We had, during the first of the year, had a big freshet, and we had to take care of that road. Nobody would take care of it, and I spent, [103] with two men and one of my Cats, we spent fourteen days this winter season.

Q. The answer is that you don't know whether that expense was thrown into road maintenance for the Bonanza operation?

A. I couldn't, you know—I couldn't——

Q. Now, I have just——

A. ——I think that that was—is that for Bonanza?

Q. That's for Bonanza, yes.

(Testimony of J. J. Oberbillig.)

A. Well, I think that that is absolutely true, working on the road there.

Q. Now, the road in connection with the Idaho Power Company? A. No.

Q. Something else?

A. That would be the road going to Bonanza.

Q. Now, there—here is Antimony Ridge—an analysis of the income expenses there, and you have, as one of the expenses, “Cat, car and truck expense, four thousand seven hundred and sixty-seven dollars and eight-five cents.” Could that have been the expense you were talking about?

A. That’s ’43, isn’t it?

Q. That’s ’43, yes. Can you see that all right?

A. Yes, I was taking out——

Q. It is your third item?

A. Yes; I was taking out quite a lot of—oh, well, the Cats that year worked right through all winter on that, you know, and [104] all summer on Antimony Ridge, you know.

Q. Was that in connection with the road for Idaho Power Company?

A. No; that was in connection with taking out ore.

Q. Now, you didn’t take that deduction in connection with the Stibnite property—the royalty income you received?

A. Was that taken in connection with the Stibnite property?

Q. No; I am asking you—you didn’t take it on this return?

(Testimony of J. J. Oberbillig.)

A. Oh, no—no, because I was taking ore on Antimony Ridge that year.

Q. You just didn't take the expense at all on the return, is that right?

A. Well, I don't know how those fellows worked it.

The Court: You are offering that in evidence. It has already been offered?

Mr. Picco: Yes, I have, your Honor. Yes, thank you.

The Court: And leave was given to withdraw it and substitute photostatic copy?

Mr. Picco: Thank you, very kindly.

The Court: Very well.

Q. You mentioned that certain property taxes—or, not—it wasn't a property tax—mining license tax was based on Petitioner's five per cent interest? Didn't you mention something about that at the very end of your testimony?

A. We have to pay a mining tax. Now, I am sure of that, [105] now, I am not too familiar with that——

Q. That is under the Idaho law, is that correct?

A. We pay a mining tax for all our income, you know, that we get in—net income—I think it's the net income, and we pay that and I have been paying that right along.

Q. Now, do you know whether that mining license has to do with actual mining of the property which you are mining, like Antimony Ridge?

A. No; I wouldn't know.

(Testimony of J. J. Oberbillig.)

Q. You wouldn't know. I have just one or two more questions. I want to touch very briefly on the Bonanza and the Antimony Ridge properties. It was stipulated quite a bit. Now, the location of those properties—they are—how far away are they from the Stibnite properties?

A. You mean Antimony Ridge from the Stibnite property? Twenty miles by road.

Q. And the Cinnabar properties—that's—

A. That's the one.

Q. That's operated jointly, isn't it—Petitioner and Bonanza operate that one jointly?

A. Well, the Bonanza, you know—the Bonanza was the Cinnabar—

Q. Yes.

A. —as far as the Hermes Group, you see.

Q. Now, that is twenty miles away from [106] Stibnite?

A. From—oh, no; it joints Stibnite on the east.

Q. Antimony Ridge is twenty miles away?

A. Antimony Ridge is twenty miles away. And there is where every winter we have had a lot of snow removal on that road, you know.

Q. Your mining operations on these two tracts of land were on a limited scale, weren't they?

A. They were what?

Q. On a limited scale.

A. Oh, yes.

Q. They were worked and operated by the Petitioner?

A. Yes.

Q. I want to touch very briefly on Exhibit 10, the valuation report. I hand you Petitioner's Ex-

(Testimony of J. J. Oberbillig.)

hibit 10, which is this controverted valuation report, and I ask you, do you know of your own knowledge anything about the contents of this?

A. Oh, I know about it. We went to Salt Lake, and Mr. Carr and Mr. Martella (phonetic) were in the office there with myself and Mr.—and we agreed on that stuff. They said—Mr. Carr fixed it up—he said, “I’ll fix that up for you so that it would be all right.”

Q. You——

A. And Mr. Middleton (phonetic), he—I am not familiar, you know. I am not in that line of work.

Q. Now, were you people talking about the replacement value [107] of these mining claims? In this report?

A. I wouldn’t know.

Q. You wouldn’t know? A. No.

Mr. Picco: Your witness.

Mr. Carver: If the Court please, I believe it would expedite the matter just a little if we could have perhaps a very brief recess to confer.

The Court: Very well, we will recess for ten minutes.

(Whereupon, a recess was taken at 3:10 o’clock p.m. until 3:30 o’clock p.m., at which time the hearing reconvened, with the parties heretofore mentioned being present.)

The Court: Very well, gentlemen. You may proceed.

The Clerk: Exhibit 13 for identification.

(Petitioner’s Exhibit 13, Witness Oberbillig, was marked for identification.)

(Testimony of J. J. Oberbillig.)

Redirect Examination

By Mr. Carver:

Q. Mr. Oberbillig, counsel has brought up the matter of your relationship, that, in particular your motives, purposes, in working on this tungsten strike in the Hennessey Group. I will hand you Petitioner's Exhibit 13 for identification and ask you to state what that is? (Exhibit handed.)

A. That is a letter from Mr. P. R. Bradley, who was the brother of Mr. W. F. Bradley, and the uncle to John Bradley, who [108] was Executive Vice President of Bradley Mining Company. This is the uncle to him.

Q. What is the date of that letter?

A. The date of this letter is June 8, 1944.

Q. Now, do you have the original of that letter?

A. Yes, indeed, I have.

Q. Where is it?

A. It is in Boise, in the files. In fact, it is in Boise, in the bank box.

Mr. Carver: If the Court please——

The Court: Is that Bradley an officer of the Bradley Company, or is he a person in authority?

A. He was in absolute authority at the time.

Mr. Carver: If the Court please, I would like to offer this Exhibit into evidence, with leave, if counsel will agree, that we may substitute the original. By inadvertence, we did not bring it with us. Counsel has seen it. Perhaps it would be agreeable if we were to exhibit the original to counsel and have it

(Testimony of J. J. Oberbillig.)

agreed then that this would be admitted at that time as a true copy?

Mr. Picco: The substitution of the original won't be necessary. I have seen it somewhere. I was wondering whether you would go into it a little more and find out just what some of that—develop what it is, it might be better.

Mr. Carver: If the Court please, in order that my questions may be clear, I will ask leave to read the exhibit. [109]

Mr. Picco: Are you going to read the entire exhibit?

Mr. Carver: Well, perhaps I——

Mr. Picco: I would prefer you wouldn't.

Mr. Carver: I can show it to the Judge and then ask him questions on it. (Exhibit handed.)

Q. Now, this letter, Exhibit 13 for identification, which we are offering into evidence, Mr. Oberbillig, refers to the Hennessey property. Is that the property upon which the strike was made by the drilling which resulted in the—— A. Yes, sir.

Q. This letter from Mr. P. R. Bradley was in connection with your activities in seeing the values in that property, is that correct?

A. That's true.

Q. And this was a recognition from the Bradley Mining Company that you were the one that had foreseen the qualities of that particular piece of property? A. Yes, sir.

Mr. Carver: I offer this into evidence.

Mr. Picco: I don't have any objection to that,

(Testimony of J. J. Oberbillig.)

your Honor. I don't care about the original. I will accept that as being——

The Court: Very well, there being no objection, Petitioner's Exhibit 13 is received in evidence.

Mr. Carver: We have nothing further, your Honor. [110]

(Whereupon, Petitioner's Exhibit 13 for identification, witness Oberbillig, was received in evidence.)

Recross-Examination

By Mr. Picco:

Q. I direct your attention to Petitioner's Exhibit 13, which is this letter from Mr. Bradley. This has to do with the drilling by the Bureau of Mines, is that correct? A. Yes, that's correct.

Q. And it's—and you described the set-up and the way this thing happened with the Bureau of Mines in your testimony prior to this, did you not?

A. Yes.

Q. This is the matter that he is talking about here? A. That's it exactly.

Mr. Picco: That's all, your Honor.

Mr. Carver: We have nothing further.

The Court: Very well, you may stand aside, sir.

Mr. Carver: That's all, Mr. Oberbillig.

The Witness: That's all?

(Witness excused.)

Mr. Carver: We have no further witnesses. Petitioner rests.

(Petitioner rests.)

Mr. Picco: Respondent rests.

(Respondent rests.) [111]

The Court: Very well, what is your pleasure in regard to time for filing briefs?

Mr. Picco: If your Honor please, I am just wondering whether you would entertain a motion at this time to withdraw Respondent's Exhibit 8, which is the income tax return for 1943, for the purpose of photostating it and returning it within twenty-four hours?

The Court: Oh, yes, you can withdraw it at any time now, and substitute that—if you want to substitute it before we leave——

Mr. Picco: Yes, I would like to do that now, if possible.

The Court: Very well.

Mr. Carver: If the Court please, in that connection, we would ask leave, if it is agreeable with counsel, to physically withdraw—give us a chance to copy it, Exhibit Number 10, and then to return it to the files. It would take us a little longer.

The Court: Typewritten copy?

Mr. Carver: Yes.

The Court: Substitute a typewritten copy?

Mr. Carver: That is right.

The Court: If you will permit counsel to check and see that it is correct, that is satisfactory.

Mr. Picco: Yes. I am perfectly satisfied that they would do nothing to the document that they would want to take out. In fact, it might be agreeable, if you are going to permit that it be withdrawn

as a physical exhibit, that it be used by both parties [112] in connection with their briefs, and then returned to the Court, if that is agreeable?

The Court: That would be perfectly all right. You can withdraw it——

Mr. Picco: Would it be all right to take that out now?

The Court: Yes, you can withdraw it now, but if you are going to have it copied, I would just have it typed and filed while I am still here.

Mr. Picco: Do you plan to send that copy down?

Mr. Carver: Well, it would not be possible, if your Honor please, I won't be back in my office until next Monday.

The Court: Oh, I see.

Mr. Carver: So I would like leave, in connection with what counsel said, withdraw it physically for use in preparing the briefs, and then further——later——

The Court: File the same——

Mr. Carver: The same document.

The Court: ——the same document.

Mr. Carver: Yes, sir.

The Court: Very well, that may be done. My only request is that it be returned to our files as soon as possible.

Mr. Carver: Yes.

Mr. Picco: As I understand it, he will use it for his brief and then see that I get a copy?

Mr. Carver: I will give it to you. [113]

The Court: Well, I don't know if it should be kept out until brief date. I would prefer that you——

Mr. Carver: I will have it copied, then, your Honor.

The Court: —I would prefer that you have it copied and sent in.

The Clerk: Will counsel please sign a receipt for an exhibit—

The Court: And do you anticipate that you will file a copy before Wednesday of next week, or will you mail it into Washington?

Mr. Carver: I will have it in by Wednesday of next week.

The Court: Very well, you can hand it to the Clerk. The Court would like to have consecutive briefs in this case.

Mr. Picco: I was just wondering, your Honor—I have gone along with you for the last two days on that. I am going to find myself waiting for these briefs to come in, and they will all come in at the same time. I would prefer to start working on one of these briefs. I don't operate so good when I don't know what the other—I know I will probably wait for these other briefs. I wonder if you could make an exception in this case?

The Court: I don't object to simultaneous briefs in stipulated cases, but I don't like them in cases where we have testimony and findings of fact based on testimony. I like to have the Petitioner make his findings of fact and then the Respondent to [114] call whatever attention his disagreement may be with the Petitioner's findings of fact and give the Court some assistance in that regard. I will give you plenty of time on your briefs, as far as that is con-

cerned.

Mr. Picco: All right, your Honor. I may have to ask for an extension.

The Court: And if you have to have an extension, you can get an extension. How much time for your original brief, Mr. Carver?

Mr. Carver: I am not familiar with the practice, your Honor. Sixty—if sixty days would not be too long, I would appreciate that much time.

The Court: How much time do you want after you receive his brief, Mr. Picco? Forty-five days?

Mr. Picco: How many?

The Court: Would you want forty-five days?

Mr. Picco: I would like forty-five days.

The Court: Well, what will sixty days fall on?

The Clerk: July 2nd, your Honor.

The Court: Petitioner's original brief to be filed on or before July 2nd; and what will forty-five days after that be?

The Clerk: August 16.

The Court: Respondent's answer to be filed on or before August 16th; and twenty days from that date.

The Clerk: September 5. [115]

The Court: Petitioner's reply brief to be filed on or before September 5th. Now, gentlemen, make a note of those dates so that—

Mr. Carver: Yes, we have them.

The Court: —you will have them. Now, if there is nothing further, gentlemen, we will be recessed until 10 o'clock tomorrow morning.

Mr. Carver: Thank you, your Honor.

Mr. Picco: Thank you, your Honor.

(Whereupon, at 3:50 o'clock p.m., the hearing in the above-entitled petition was [116] closed.)

[Title of Tax Court and Cause.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 25, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review," including exhibits 1-A thru 5-E attached to the stipulation of facts, Petitioner's Exhibits 6 thru 13, admitted in evidence and Respondent's Exhibit H (F and G marked for identification and not offered), in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of April, 1957.

[Seal] /s/ RALPH A. STARNES,
Chief Deputy Clerk, Tax
Court of the United States.

[Endorsed]: No. 15528. United States Court of Appeals for the Ninth Circuit. United Mercury Mines Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: April 26, 1957.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

Docket No. 15528

UNITED MERCURY MINES COMPANY, a Cor-
poration,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF RECORD
FOR PRINTING

Appellant hereby designates that the whole of the record including the transcript of the testimony is to be printed; Appellant further designates that the exhibits contained in the record are not to be

printed and requests the Court to consider all the exhibits in their original form.

Dated this 31st day of May, 1957.

/s/ JOHN A. CARVER, JR.,

/s/ DALE CLEMONS,

Attorneys for Appellant.

Certificate of service attached.

[Endorsed]: Filed June 3, 1957.

[Title of Court of Appeals and Cause.]

CERTIFICATE OF SERVICE

State of Idaho,

County of Ada—ss.

Dale Clemons, being first duly sworn, deposes and says:

That he is one of the attorneys for appellant in the above-entitled cause, and hereby certifies that on the 31st day of May, 1957, he served a copy of the Designation of Record for Printing upon the respondent by mailing a copy of such Designation of Record for Printing to John Potts Barnes, Chief Counsel, Internal Revenue Service, P. O. Box 3935, Portland, Oregon, attorney for the respondent above named; that he mailed the same by depositing said copy in an envelope directed to the address stated herein and affixed sufficient postage thereon and mailed the same in the United States Post Office at

Boise, Idaho; that all of the above and foregoing was done on the 31st day of May, 1957.

/s/ DALE CLEMONS.

Subscribed and Sworn to before me this 31st day of May, 1957.

[Seal] /s/ ROBERT W. GREEN,
Notary Public for Idaho,
Residing at Boise, Idaho.

No. 15,530

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN CAVANAUGH,

Appellant,

vs.

B. E. McKENZIE,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

APPELLANT'S OPENING BRIEF.

WILLIAM O. BRADLEY,

GRUBIE, DRENDEL & BRADLEY,

130 North Virginia Street, Reno, Nevada,

Attorneys for Appellant.

FILED

SEP 17 1957

PAUL R. HARRIS, CLERK

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No. 15,530

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN CAVANAUGH,

VS.

B. E. MCKENZIE,

Appellant,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

On January 24, 1957, John Cavanaugh, appellant, filed a complaint in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, against B. E. McKenzie, appellee, alleging that appellant was the owner of certain real property situate in Washoe County, Nevada; that appellee, as commanding officer of Stead Air Force Base, Washoe County, Nevada, had exceeded his lawful authority by obstructing appellant's access to and from his property, depriving appellant of the use of his property without due process of law.

Appellant prayed that a temporary restraining order issue enjoining appellee from obstructing appellant's access to and from his property and upon a final hearing of the cause, the injunction be made permanent. (Rec. p. 5.)

The temporary restraining order issued on January 24, 1957. (Rec. p. 9.) On January 30, 1957, appellee filed a petition for removal of the cause to the United States District Court for the District of Nevada, pursuant to 43 USCA, Section 1442 (a). (Rec. p. 3.)

On January 30, 1957, appellee filed a motion to dissolve the temporary restraining order issued by the State Court. (Rec. p. 12.)

On February 4, 1957, appellant filed an amended complaint in the United States District Court for the District of Nevada against appellee seeking to enjoin appellee from unlawfully depriving appellant of the use of his property. In the amended complaint, appellant alleged that he was the owner of the property in question, that appellee was the commanding officer of Stead Air Force Base, Washoe County, Nevada, that appellee unlawfully and forcibly restrained appellant from access to and from his property; that appellant had no other convenient means of ingress to or egress from his property, that appellee threatened to continue to obstruct appellant's access to his property, permanently and irreparably diminishing the value of appellant's property; that the action on the part of the appellee was and is beyond any authority conferred upon him as commanding officer of Stead Air Force Base, Washoe County, Nevada, in that

no authority whatsoever has been vested in the appellee by statute, or otherwise, to obstruct roads or other rights of way in the vicinity of Stead Air Force Base, Washoe County, Nevada, upon property held by the United States Government, subject to any and all easements in, upon or across said land. (Rec. p. 13.)

On the basis of this amended complaint, the United States District Court for the District of Nevada issued a temporary restraining order enjoining appellee from obstructing appellant's access to and from his property and ordering appellee to show cause why a preliminary injunction should not issue *pendente lite*. On February 8, 1957, a hearing was held pursuant to the order to show cause why a preliminary injunction should not issue *pendente lite*. (Rec. p. 54.) The Court issued the preliminary injunction and on February 8, 1957, the Honorable Jon R. Ross, District Judge, signed the findings of fact, conclusions of law and preliminary injunction which were filed with the clerk of the Court on February 11, 1957. (Rec. p. 18.)

Following this, appellee filed a motion to dismiss the action, "because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit." (Rec. p. 17.) Thereafter, on February 26, 1957, the Court heard oral arguments, briefs having been submitted, on appellee's motion to dismiss. (Rec. p. 33.) On March 25, 1957, the Court filed its order granting motion to dismiss action. (Rec. p. 21.)

On April 2, 1957, appellant duly filed his notice of appeal (Rec. p. 70) and undertaking on appeal

(Rec. p. 70) appellant's designation of record on appeal was then duly filed.

On July 31, 1957, the United States District Court filed its order dismissing the action. (Rec. p. 72.)

On August 1, 1957, appellant duly filed his amended notice of appeal from the order dismissing the action, (Rec. p. 73) and his amended designation of record on appeal was also timely filed. The United States District Court for the District of Nevada had jurisdiction of this matter pursuant to 43 USCA, Section 1442(a).

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 USCA, Section 1291 and Rules 73 and 75, *Federal Rules of Civil Procedure*, to review the order of the United States District Court for the District of Nevada dismissing appellant's action.

STATEMENT OF THE CASE.

John Cavanaugh, appellant, on September 8, 1955, purchased certain lands from the estate of one George W. Burke, deceased. Included in the purchase were the following described lands: T. 20 N., R. 19 E., M.D.B.&M., Sec. 5, E $\frac{1}{2}$; E $\frac{1}{2}$ W $\frac{1}{2}$; excepting therefrom the south 200 feet thereof. George W. Burke had purchased these same lands on March 23, 1950 from the United States of America as surplus property. The United States of America, prior to the sale to Burke, owned all of Sec. 5, T. 20 N., R. 19 E., M.D.B.&M. In the sale to George W. Burke, the fol-

lowing lands in Sec. 5, T. 20 N., R. 19 E., M.D.B.&M. were conveyed from the United States of America to Burke, subsequently to appellant, "E $\frac{1}{2}$; E $\frac{1}{2}$ W $\frac{1}{2}$; excepting therefrom the south 200 feet thereof." This constituted a severance of the above lands from the balance of Section 5, the United States of America retaining title to the following lands in Section 5: W $\frac{1}{2}$ of W $\frac{1}{2}$; the south 200 feet of the entire section.

The only means of ingress to and egress from appellant's property in Section 5 was via a road transversing the south 200 feet of Section 5, which was unobstructed and in use when Burke acquired the property from the United States of America, and also unobstructed and in use when appellant acquired the property from Burke's estate.

On or about August 1, 1956, B. E. McKenzie, appellee, and commanding officer of Stead Air Force Base, Washoe County, Nevada, placed a padlocked gate across the road above mentioned completely depriving appellant of his only means of ingress to and egress from his property in Section 5, T. 20 N., R. 19 E., M.D.B.&M. Appellant then filed suit to enjoin appellee from obstructing appellant's easement to his property in Section 5, T. 20 N., R. 19 E., M.D.B.&M. Appellant then filed suit to enjoin appellee from obstructing appellant's easement to his property on the grounds that appellant had an easement to his property via the old road, that appellee had no authority to terminate the easement, that appellee had in fact unlawfully obstructed the road thereby unlawfully and without any authority so to do terminated appel-

lant's easement, thereby permanently and irreparably diminishing the value of appellant's property above described. (Rec. pp. 13, 14, 15.) The suit was initially filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, (Rec. p. 5) and ultimately removed by appellee to the United States District Court for the District of Nevada. (Rec. p. 3.)

In the United States District Court for the District of Nevada, on February 8, 1957, a hearing was held on an order to show cause why a preliminary injunction should not issue. (Rec. p. 54.) On February 8, 1957, the preliminary injunction issued and on February 11, 1957, it was filed with the Clerk of Court. (Rec. pp. 18, 19, 20.)

On February 8, 1957, appellee filed a motion to dismiss the action on the ground that the Court did not have jurisdiction, because the suit was in substance and effect against the United States of America and no consent had been given to sue. (Rec. p. 17.) Appellant opposed the motion, and at the hearing on the motion to dismiss argued that the suit was not against the United States of America, but against the appellee, because, he had without any authority, statutory or otherwise, taken away appellant's only means of ingress to and egress from his above described property, that is, he had destroyed an easement owned by appellant. The easement is a property right, and incorporeal hereditament owned by appellant and the action of appellee amounted to a deprivation of appellant's property without the process of law contrary to

the Fifth Amendment of the Constitution of the United States, and, therefore, the suit was not against the United States of America but against appellee. (Rec. pp. 40-52.)

The United States District Court granted the motion to dismiss on the grounds that the suit was in substance and effect against the United States of America and the United States of America had not consented to be sued or waived its immunity from suit. (Rec. p. 72.) From the order dismissing the action, appellant has processed this appeal.

QUESTION INVOLVED.

Did the United States District Court for the District of Nevada err in dismissing appellant's action on the grounds of sovereign immunity, because the suit falls squarely within the constitutional exception to the doctrine of sovereign immunity?

SPECIFICATION OF ERROR.

The United States District Court for the District of Nevada had jurisdiction of the parties and the subject matter of the complaint, and it was, therefore, error to dismiss this complaint, and it was, therefore, error to dismiss this action pursuant to appellee's motion to dismiss because the case falls squarely within the constitutional exception to the doctrine of sovereign immunity.

SUMMARY OF ARGUMENT.

The United States District Court for the District of Nevada erred in dismissing appellant's action on a motion to dismiss for lack of jurisdiction by virtue of sovereign immunity because appellant's suit falls within the specific application of the constitutional exception to the doctrine of sovereign immunity enunciated by the Supreme Court of the United States in *United States v. Lee*, 106 U.S. 196, 27 L.Ed. 171, 1 S.Ct. 240 (1882), which exception was specifically recognized and affirmed by the Supreme Court of the United States in *Larson v. Domestic and Foreign Commerce Corp.* (1949), 337 U.S. 682, 93 L.Ed. 1628.

ARGUMENT.

On a motion to dismiss, it is axiomatic that well pleaded and material allegations of the complaint must be taken to be true and upon a motion to dismiss under the Federal Rules of Civil Procedure, the complaint should be construed in the light most favorable to the plaintiff with all doubts resolved in plaintiff's favor. *Coole v. International Shoe Co.*, 142 F. 2d 318; *Rank v. Krug*, 90 F. Supp. 773.

Appellant in his complaint alleged ownership of a property right, namely the rights of ingress to and egress from his property in Sec. 5 (Rec. pp. 13, 14), an unlawful and forceful deprivation of that property right by appellee (Rec. pp. 13, 14) beyond any authority conferred on appellee by statute or otherwise.

(Rec. p. 15.) Appellant further alleged irreparable injury in that the value of his property would be destroyed if he be deprived of his right of ingress and egress (Rec. p. 15) and further alleged that he had no adequate remedy at law. (Rec. p. 15.) Appellant prayed for a temporary restraining order, an order to show cause why a preliminary injunction should not issue enjoining appellee from interfering with, diminishing, or impairing appellant's access to and from his property, (Rec. p. 16) and for a final injunction at the conclusion of the proceeding. (Rec. p. 16.)

At the hearing on the order to show cause why a preliminary injunction should not issue the appellee admitted he had no authority to terminate an existing easement. (Rec. pp. 65-66 and 69-70.) The preliminary injunction issued (Rec. pp. 18, 19, 20) and subsequently appellee argued his motion to dismiss.

The sole basis for the motion to dismiss was "That the Court is without jurisdiction to entertain this action because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit . . ." (Rec. p. 17.) It was not pretended that appellee had any authority to deprive appellant of his easement and consequently of his fee land in Sec. 5. In the argument on the motion to dismiss appellant argued that the easement was a property right, an incorporeal hereditament, owned by him, and appellee's action in terminating this easement was a deprivation of property without due process of law contrary to

the Fifth Amendment of the Constitution of the United States of America. (Rec. p. 52.) Thus, this case falls squarely within the constitutional exception to the doctrine of sovereign immunity.

I respectfully direct the Court's attention in this regard to the case of *United States v. Lee*, 106 U.S. 196, 27 L.Ed. 171, 1 S.Ct. 240. This is the landmark decision on this question, and I submit, is controlling in the case at bar.

In the *Lee* case, the plaintiff filed an action in ejectment in a Virginia court against Kaufman and Strong, military officers in command of Ft. Arlington, a United States military reservation, and Arlington Cemetery, a national cemetery, and several other defendants, to recover possession of a parcel of land of about eleven hundred acres known as the Arlington Estate, and held by the government as part of Fort Arlington and Arlington Cemetery. As soon as the complaint was filed, the case was removed by writ of certiorari into the Circuit Court of the United States. Immediately upon removal of the cause, the following document was filed by the Attorney General of the United States in the Circuit Court of the United States, 106 U.S. 174.

| | | |
|---|---|---------------|
| <p>“George W. C. Lee vs. Frederick Kaufman, H. P. Strong and others.</p> | } | In ejectment, |
|---|---|---------------|

And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property

in controversy in this suit has been for more than ten years and now is held, occupied and possessed by the United States, through its officers and agents, charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery', and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by the plaintiff and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title, as appears by the said certificate of sale, and which was executed, delivered and recorded as therein appears.

Wherefore, without submitting the rights of the Government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

Chas. Devens,
Att'y Gen'l U. S."

Plaintiff demurred to this suggestion and on hearing the demurrer was sustained. The case was then tried to a jury, after all other defendants except Strong and Kaufman had been voluntarily dismissed, resulting in a judgment for plaintiff.

The case was then taken to the Supreme Court of the United States on two writs of error, one in the name of the United States, the other, by the Attorney General of the United States on behalf of Kaufman and Strong. Mr. Justice Miller who wrote the opinion in the Supreme Court stated the question we are here interested in to be resolved as follows, 106 U.S. 176:

“The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that which is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.

This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property, held by such persons as officers or agents for the Government.”

In holding that sovereign immunity did not preclude the action, Mr. Justice Miller analyzed the theory of sovereign immunity and distinguished our form of government from the British sovereignty where the doctrine originated. I quote Mr. Justice Miller, 106 U.S. 177:

“Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right.”

Mr. Justice Miller continued, 106 U.S. 178:

“The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States.”

The Court then cited *Meigs v. McClung*, 9 Cranch 11, and said, 106 U.S. 178:

“... The property sued for in that case was land on which the United States had a garrison erected

at a cost of \$30,000, and the defendants were the military officers in possession, and the very question now in issue was raised by these officers, who, according to the bill of exceptions, insisted that the action could not be maintained against them, 'Because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction.' They further insisted, says the bill of exceptions, that the United States had a right, by the Constitution, to appropriate the property of the individual citizen. The court below overruled these objections and held that the title being in plaintiff he might recover, and that 'If the land was private property, the United States could not have intended to deprive the individual of it without making him compensation therefor.'

Although the judgment of the circuit court was in favor of the plaintiff, and its result was to turn the soldiers and officers out of possession and deliver it to plaintiff, Ch. J. Marshall concludes his opinion in this emphatic language: 'This court is unanimously and clearly of opinion that the circuit court committed no error in instructing the jury that the Indian title was extinguished, to the land in controversy, and that the plaintiff below might sustain his action.'

We are unable to discover any difference whatever, in regard to the objection we are now considering, between this case and the one before us."

In further support of his position, Mr. Justice Miller quoted from the opinion of Ch. J. Marshall

in the case of *Osborn v. U. S. Bank*, 9 Wheat 738, as follows, 106 U.S. 179:

“... A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable . . .”

Following an exhaustive analysis of cases involving the same proposition urged by petitioners, the same proposition urged by appellee on his motion to dismiss, Mr. Justice Miller said, 106 U.S. 180:

“This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; . . .”

Mr. Justice Miller then pointed out that the proposition urged by the government was completely at variance with the Constitution of the United States, and could not be sustained. I quote, 106 U.S. 181:

“The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the Amendments to the Constitution of the United States, whose language is: ‘That no person . . . shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.’

Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation . . .

If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the Government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is

the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, having seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this,

nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. . . .

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. . . .

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government

without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights." The Court emphatically concluded, 106 U.S. 183

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is affirmed."

I respectfully submit that the *Lee* case is controlling in the case at bar. To follow the ruling of the District Court would preclude any inquiry into any action of an officer or agent of the government regardless of how wrongful the action be merely upon the assertion of sovereign immunity in a motion to dismiss.

The ruling of the *Lee* case was distinctly affirmed in the recent case of *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 93 L.Ed. 1628, though the *Larson* case was distinguished from the *Lee* case on the facts, due to the fact that there was no asserted unconstitutional taking of property in the *Larson* case, as there was in the *Lee* case and as there is in the case at bar. In his opinion, in the *Larson* case, Ch. Justice Vinson specifically recognized and affirmed the constitutional exception to the doctrine of sover-

eign immunity established in the *Lee* case. I quote Ch. Justice Vinson in this regard, 337 U.S. 696:

“United States v. Lee, 106 U.S. 196, 27 L. Ed. 171, 1 S. Ct. 240 (1882), is said to have established the rule for which the respondent contends. It did not. It represents, rather, a specific application of the constitutional exception to the doctrine of sovereign immunity. The suit there was against federal officers to recover land held by them, within the scope of their authority, as a United States military station and cemetery. The question at issue was the validity of a tax sale under which the United States, at least in the view of the officers, had obtained title to the property. The plaintiff alleged that title to the land was in him. The Court held that if he was right the defendants’ possession of the land was illegal and a suit against them was not a suit against the sovereign. *Prima facie*, this holding would appear to support the contention of the plaintiff. Examination of the *Lee* case, however, indicates that the basis of the decision was the assumed lack of the defendants’ constitutional authority to hold the land against the plaintiff.

The Court said (106 U.S. at 219):

“ ‘It is not pretended, as the case now stands, that the President had any lawful authority to (take the land), or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given,

but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation.

“ ‘Shall it be said . . . that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?’ The Court thus assumed that if title had been in the plaintiff the taking of the property by the defendants would be a taking without just compensation and, therefore, an unconstitutional action. On that assumption, and only on that assumption, the defendants’ possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be maintained against the defendants as individuals.

“The Lee case therefore, offers no support to the contention that a claim of title to property held by an officer of the sovereign is, of itself, sufficient to demonstrate that the officer holding the property is not validly empowered by the sovereign to do so. Only where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation does the Lee case require that conclusion. . . .”

CONCLUSION.

Wherefore, it is respectfully requested that the Order of the United States District Court for the District of Nevada dismissing appellant's action be reversed.

Dated, Reno, Nevada,
September 16, 1957.

WILLIAM O. BRADLEY,
GRUBIC, DRENDEL & BRADLEY,
Attorneys for Appellant.

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No. 15530

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United States
Court of Appeals
for the Ninth Circuit

JOHN CAVANAUGH,

Appellant,

vs.

CHARLES J. LONG

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada

FILED

AUG 27 1957

PAUL P. O'BRIEN, CLERK

No. 15530

United States
Court of Appeals
for the Ninth Circuit

JOHN CAVANAUGH, Appellant,

vs.

B. E. McKENZIE, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In the United States District Court
for the District of Nevada

No. 1293 Civil

JOHN CAVANAUGH, Plaintiff,

vs.

B. E. McKENZIE, Defendant.

PETITION

The petition of B. E. McKenzie, defendant in the above-entitled action, for removal to the United States District Court of the above-entitled action now pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, pursuant to Section 1442(a), Title 28, United States Code, shows:

1.

That on January 24, 1957, the above-entitled action was commenced in the said Second Judicial District Court of the State of Nevada, in and for the County of Washoe, by filing of the complaint, a copy of which is hereto attached, and the issuance of a summons thereon, and is now pending in said Court.

2.

That the nature of said action is as follows:

Complaint for injunction enjoining B. E. McKenzie, Commanding Officer, Stead Air Force Base, Washoe County, Nevada, and his successors in interest, from interfering with, diminishing, or impairing plaintiff's right of ingress to and egress

from his property, described as Township 20 North, Range 19 East, [2] M. D. B. & M., Section 5: E $\frac{1}{2}$; E $\frac{1}{2}$ of W $\frac{1}{2}$, excepting therefrom the south 200 feet thereof.

3.

Petitioner was at all times mentioned in said action, and now is, a duly appointed commissioned officer of the United States Airforce, and at all times mentioned in the complaint in said action was acting under right, title and authority vested in him, and in the discharge and performance of his official duties under and by virtue of the laws of the United States of America and regulations pertaining to the administration of the United States Air Force.

4.

That there has not as yet been any trial or final hearing of said action.

Wherefore, petitioner prays that said action may be removed from the said State Court into this Court for trial and determination as provided in Section 1442(a), Title 28, United States Code, and thereupon proceeded as a cause originally commenced therein.

Dated this 30th day January, 1957.

FRANKLIN RITTENHOUSE,

United States Attorney,

By /s/ HERBERT F. AHLSEDE,

Assistant U. S. Attorney,

Attorneys for Defendant. [3]

Duly Verified.

[Endorsed]: Filed January 30, 1957.

In the Second Judicial District Court of the State
of Nevada, in and for the County of Washoe

No. 166187, Dept. No. 2

JOHN CAVANAUGH,

Plaintiff,

vs.

B. E. McKENZIE,

Defendant.

COMPLAINT FOR INJUNCTION

Plaintiff complains of defendant and for cause
of action alleges:

I.

At all times herein mentioned, plaintiff was, and
now is, a resident of Reno, Washoe County, Nevada.

II.

At all times herein mentioned, plaintiff was, and
now is, the owner of the following described real
property situate, lying and being in Washoe County,
Nevada:

T. 20 N., R. 19 E., M. D. B. & M. Sec. 5: E $\frac{1}{2}$;
E $\frac{1}{2}$ of W $\frac{1}{2}$, excepting therefrom the south 200
feet thereof.

III.

At all times herein mentioned, defendant was,
and now is, the Commanding Officer at Stead Air
Force Base, Reno, Washoe County, Nevada.

IV.

That on or about the 1st day of August, 1956,
defendant unlawfully caused an obstruction, namely,

a padlocked gate, to be placed across the dirt road at the point [4] designated "Present Gate" on the map attached hereto and incorporated herein by reference thereto, and defendant, unlawfully, forcibly restrained plaintiff from using said road to gain access to his property via the old Purdy Highway designated as "Old Purdy Highway" on the map attached hereto; that plaintiff and the general public have enjoyed unobstructed use of this road in this area for many years in lieu of the access heretofore enjoyed by plaintiff to his property via the old Purdy Highway which is now obstructed by a fence maintained by defendant.

V.

That said action on the part of defendant was beyond any authority conferred upon him as Commanding Officer of Stead Airforce Base, Reno, Washoe County, Nevada, in that no authority whatsoever has been vested in the defendant by statute, or otherwise, to obstruct roads or other existing rights of way in the vicinity of Stead Airforce Base, Reno, Washoe County, Nevada, upon property held by the United States Government "subject to any and all easements and rights of way in, upon or across said land."

VI.

That defendant is an abutting property owner on the old Purdy Highway as indicated on the map attached hereto and that if the defendant is not enjoined from obstructing plaintiff's access to his

property via the old Purdy Highway, plaintiff will suffer great and irreparable damage and injury in that he will be deprived of the use of his property without due process of law. That defendant is currently obstructing plaintiff's access to his property via the old Purdy Highway and is now depriving plaintiff of the use of his property without due process of law. [5]

VII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays:

1. That a temporary restraining order issue out of this Court enjoining the defendant from obstructing plaintiff's access to his property via the old Purdy Highway.

2. That an order to show cause be issued by this Honorable Court ordering and commanding said defendant to be and appear before said Court at a time and place to be fixed in said order and then and there to show cause why he should not be enjoined and restrained from interfering with, diminishing or impairing plaintiff's right of access to and from his property above described.

3. That upon the final hearing of this cause, the defendant and his successors in interest be perpetually enjoined from interfering with, diminishing or impairing plaintiff's right of ingress to and egress from his property above described via the old Purdy Highway.

4. For such other and further relief as to this Court may seem just in the premises.

GRUBIC, DRENDEL & BRADLEY,

By WILLIAM O. BRADLEY,

Attorneys for Plaintiff. [6]

Duly Verified.

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

SUMMONS

The State of Nevada sends greetings to the above-named defendant:

You are hereby summoned and required to serve upon Grubic, Drendel & Bradley, plaintiff's attorney, whose address is 304 Medico-Dental Bldg., 130 N. Virginia St., Reno, Nevada, an answer to the Complaint which is herewith served upon you, within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.*

[Seal]

H. K. BROWN,

Clerk of Court,

By /s/ D. CAIN,

Deputy Clerk.

Date: January 24, 1957.

Received January 29, 1957.

*Note.—When service is by publication, insert a brief statement of the object of the action. See Rule 4. [7]

[Title of Second Judicial District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

Upon the verified complaint of John Cavanaugh attached hereto, it is

Ordered, that the defendant, B. E. McKenzie, show cause before this court on Friday, February 1, 1957, at 3:00 o'clock p.m., or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining the defendant, B. E. McKenzie, his agents, servants, employees and attorneys and all persons in active concert and participation with him, pending the final hearing and determination of this action from obstructing the access of plaintiff, his agents, servants, employees and successors in interest, to and from his property via the old Purdy Highway, and

It appearing to the court that defendant is committing the acts hereinafter specified and that he will continue to do so unless restrained by order of this court, and that immediate and irreparable injury, loss and damage will result to plaintiff before notice can be served and a hearing had on plaintiff's motion for a preliminary injunction, in that [8] plaintiff is being and will continue to be deprived of the use of his property without due process of law, and plaintiff having given security approved by the court in the sum of \$500 for the payment of such costs and damages as may be incurred or suffered by any party who is found to

have been wrongfully enjoined or restrained; it is further

Ordered, that defendant, B. E. McKenzie, his agents, servants, employees and attorneys and all persons in active concert and participation with him be and they hereby are restrained from obstructing access of plaintiff, his agents, servants, employees and successors in interest to and from his property via the old Purdy Highway, and it is further

Ordered, that this order expires within 10 days after entry unless within such time the order for good cause shown is extended for a like period, or unless the defendant consents that it may be extended for a longer period; and it is further

Ordered, that service of this order to show cause, together with a copy of the papers hereto attached, on defendant B. E. McKenzie on or before Saturday, January 26, 1957, at 12 m. o'clock be deemed sufficient service.

Dated: January 24th, 1957.

/s/ A. J. MAESTRETTI,
District Judge. [9]

[Endorsed]: Filed January 24, 1957.

[Title of Second Judicial District Court and Cause.]

BOND FOR TEMPORARY RESTRAINING ORDER

Whereas the above-named plaintiff has commenced an action and issued Summons therein in the Second Judicial District Court of the State of

Nevada in and for the County of Washoe, against the above-named defendant, and is about to apply for an order to show cause and a restraining order in said action against said defendant, enjoining and restraining him, his agents, servants, employees and attorneys from the commission of certain acts as in said complaint filed in said action are more particularly set forth and described;

Now, therefore, the Hartford Accident and Indemnity Company, a Connecticut corporation authorized to transact a surety business in the State of Nevada, in consideration of the premises and of the issuance of said restraining order, does undertake in the sum of \$500, and promise to the effect that in case said restraining order is issued, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the said sum of \$500, as such defendant may sustain or incur, by reason of said restraining order, if the said court finally decide that the plaintiff was not [10] entitled thereto.

Dated this 24th day of January, 1957.

HARTFORD ACCIDENT &
INDEMNITY CO.,

By /s/ J. E. SLINGERLAND,
Attorney in Fact.

The above bond approved this 24th day of January, 1957.

/s/ A. J. MAESTRETTI,
District Judge. [11]

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

MOTION

B. E. McKenzie, defendant above-named, through his attorney, Franklin Rittenhouse, United States Attorney, by Herbert F. Ahlswede, Assistant United States Attorney, respectfully moves the Court that the temporary restraining order issued herein by the Second Judicial District Court of the State of Nevada be dissolved and vacated, for the following reasons:

1. The temporary restraining order was granted without notice to the adverse party and did not comply with Rule 65(b), Nevada Rules of Civil Procedure, in that the immediate and irreparable loss, injury or damage was not shown by specific facts in the affidavit or verified complaint.

2. The temporary restraining order did not comply with Rule 65(b), Nevada Rules of Civil Procedure, in that it did not define the injury and state why it was irreparable.

Dated January 30, 1957.

FRANKLIN RITTENHOUSE,

United States Attorney,

By /s/ HERBERT F. AHLSEDE,

Assistant United States Attorney, Attorney for Defendant. [12]

[Endorsed]: Filed January 30, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

At all times mentioned herein, plaintiff was, and now is, a resident of Reno, Washoe County, Nevada.

II.

At all times mentioned herein, plaintiff was, and now is, the owner of the following described real property situate, lying and being in Washoe County, Nevada:

Township 20 North, Range 19 East, M. D. B. & M. Sec. 5: E $\frac{1}{2}$; E $\frac{1}{2}$ of W $\frac{1}{2}$, excepting therefrom the south 200 feet thereof.

III.

At all times mentioned herein, defendant was, and now is, the Commanding Officer at Stead Airforce Base, Washoe County, Nevada.

IV.

That on or about the 1st day of August, 1956, defendant unlawfully [13] caused an obstruction, namely a padlocked gate, to be placed across the dirt road at the point designated "Present Gate" on the map attached hereto and incorporated herein by reference thereto, and defendant unlawfully forcibly restrained plaintiff from using said road to gain access to his property above described; that plaintiff, his predecessors in interest, and the gen-

eral public have enjoyed unobstructed use of this road in this area for many years in lieu of the access heretofore enjoyed by plaintiff to his property via the Old Purdy Highway which is now unlawfully obstructed by a fence maintained by the defendant; that plaintiff has no other convenient means of ingress to and egress from his property aforesaid, save and except over the road through the now padlocked gate or via the Old Purdy Highway which is now obstructed by the fence maintained by defendant; that defendant threatens to continue to maintain the padlocked gate aforesaid and to maintain the fence across the Old Purdy Highway, thereby permanently and irreparably diminishing the value of plaintiff's property above described.

V.

That plaintiff's property above described abuts on the Old Purdy Highway as indicated on the map attached hereto and that if the defendant is not enjoined from obstructing plaintiff's ingress to and egress from his property, plaintiff will suffer great and irreparable injury in the following respects:

1. Plaintiff has two buildings under construction on said property, and he has construction crews and building materials standing by to complete said buildings; that plaintiff now has opportunities to rent said buildings when finished, but he is unable to finish said buildings because defendant has unlawfully obstructed his access as above described.

2. Plaintiff has contracted for the removal of other buildings which [14] he must immediately and

forthwith remove from their present sites or lose them; that the only property to which plaintiff can move the buildings is the property now barricaded by defendant, as above described; that said buildings can not be replaced.

3. The value of his property will be immediately and irreparably destroyed if plaintiff is wrongfully deprived by defendant of his right of ingress and egress to and from said property, as above described.

VI.

That said action on the part of defendant was and is beyond any authority conferred upon him as Commanding Officer of Stead Airforce Base, Washoe County, Nevada, in that no authority whatsoever has been vested in the defendant by statute, or otherwise, to obstruct roads or other existing rights of way in the vicinity of Stead Airforce Base, Washoe County, Nevada, upon property held by the United States Government "subject to any and all easements and rights of way in, upon or across said land."

VII.

That plaintiff has no plain, speedy or adequate remedy at law in that the unlawful actions on the part of the defendant in barricading plaintiff's property has been continuous for some time in the past and the defendant threatens to continue to maintain the barricades in the future.

VIII.

That the damage herein complained of will be done before notice can be served on defendant and

a hearing had on plaintiff's motion for a preliminary injunction.

Wherefore, plaintiff prays:

1. That a temporary restraining order issue out of this Court enjoining the defendant from obstructing plaintiff's access to his property through the gate designated "Present Gate" as well as via the Old Purdy Highway, both [15] situate in the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 5, Township 20 North, Range 19 East, M. D. B. & M.

2. That an order to show cause be issued by this Honorable Court ordering and commanding said defendant to be and appear before said Court at a time and place to be fixed in said order and then and there to show cause why he should not be enjoined and restrained from interfering with, diminishing or impairing plaintiff's right of access to and from his property above described through the gate designated "Present Gate" on the map attached hereto, as well as via the Old Purdy Highway as indicated on the map attached hereto, pending a final determination of this action.

3. That upon the final hearing of this cause, the defendant and his successors in interest be perpetually enjoined from interfering with, diminishing or impairing plaintiff's right of ingress to and egress from his property above described through the gate designated "Present Gate" on the map attached hereto, as well as via the Old Purdy Highway as indicated on the map attached hereto.

4. For costs of suit and such other and further relief as to this Court may seem just in the premises.

GRUBIC, DRENDEL & BRADLEY,

By /s/ WILLIAM O. BRADLEY,

Attorneys for Plaintiff. [16]

Duly Verified.

[Endorsed]: Filed February 4, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, B. E. McKenzie, by Franklin Rittenhouse, United States Attorney, and moves the Court to dismiss the above entitled action on the ground that the Court is without jurisdiction to entertain this action because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit. This Motion is based upon the pleadings, records, and testimony in the above entitled action.

Dated this 8th day of February, 1957.

FRANKLIN RITTENHOUSE,

United States Attorney,

By /s/ HERBERT F. AHLSEDE,

Assistant U. S. Attorney. [17]

[Endorsed]: Filed February 8, 1957.

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

This Cause came on to be heard pursuant to order to show cause why a preliminary injunction should not issue and the Court having considered the verified complaint on file herein and having heard oral evidence in open court, the Court makes the following

Findings of Fact

1. That plaintiff owns the following land:

T 20 N., R 19 E., M. D. B. & M. E $\frac{1}{2}$; E $\frac{1}{2}$ of W $\frac{1}{2}$ excepting the southerly 200 feet thereof.

2. That the United States Government owns a strip of land 200 feet wide across the entire south end of Section 5, Township 20 N., Range 19 E., M. D. B. & M.

3. That plaintiff is being denied access to his property above described by a gate closed and padlocked by the defendant in a fence maintained by the defendant on the section line dividing Section 8 and Section 5, Township 20 N., Range 19 E., M. D. B. & M.

4. That the gate in the fence above described is located on the section line between Section 5 and Section 8 [18] Township 20 N., Range 19 E., M. D. B. & M., approximately 2500 feet east of the southwest corner of Section 5, Township 20 North, Range 19 East.

5. That the fence aforesaid maintained by de-

defendant obstructs all access which plaintiff has to his property above described.

6. That plaintiff has no other convenient means of access to his property above described save and except through the gate aforesaid.

7. That plaintiff currently has under construction certain buildings situate on his property above described and plaintiff will not be able to complete construction of these buildings unless he is granted access to his property.

8. That plaintiff has other buildings which he has contracted to move and which he must move or lose; that the only property plaintiff has to which he can move the aforesaid buildings is his property above described.

9. That if plaintiff is denied access to his property, the value of the property is seriously impaired.

10. That the damage, if any, which may be suffered by the Government in granting plaintiff access to his property through the gate above described will be negligible in the event it is ultimately concluded at the trial of this matter that plaintiff has no lawful right of way or easement across the southerly 200 feet of Section 5 above described.

On the basis of the foregoing, the Court makes the following

Conclusions of Law

1. That if plaintiff is not granted access to his property pending a final determination of this matter, he will suffer great and irreparable injury in that:

a. He will be unable to complete the construction [19] on his buildings now under construction on his land above described.

b. That plaintiff will not be able to move the buildings which he has contracted to move and will therefore lose them; that the buildings cannot be replaced by plaintiff.

c. That the value of plaintiff's property will be seriously impaired.

2. That plaintiff has no adequate remedy at law.

It Is Therefore Ordered:

That defendant, his agents, servants, employees and attorneys, and all persons in active concert and participation with him, be and they hereby are restrained and enjoined, pending the determination of this action, from obstructing access of plaintiff, his agents, servants, employees and successors in interest to and from his property through the gate in the fence above described and via the Old Purdy Highway across the southerly 200 feet of Section 5 to where it abuts on plaintiff's property in the E1½ of the W1½ of Section 5, Township 20 N., Range 19 E., M. D. B. & M.; provided that plaintiff first give security in the sum of \$2500 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined.

Dated: February 8, 1957.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed February 11, 1957.

In the United States District Court
for the District of Nevada

No. 1293

JOHN CAVANAUGH, Plaintiff,

VS.

B. E. McKENZIE, Defendant.

ORDER GRANTING MOTION TO DISMISS ACTION

The history of this matter is as follows: On January 24th, 1957, plaintiff filed his petition in the Second Judicial District Court of the State of Nevada, in and for Washoe County. In it plaintiff alleged himself the owner of certain lands contiguous to the government owned Stead Air Force Base; that defendant was and is the Commanding Officer at Stead Air Force Base; that defendant had obstructed a dirt road leading across a portion of the Base by placing a gate across the same; that plaintiff and his predecessors had enjoyed right of access to the lands presently owned by him over the dirt road now closed; that he was irreparably injured. The prayer was for a temporary restraining order, an order to show cause, and an injunction requiring the defendant to remove the gate complained of and to thereafter refrain from interfering with plaintiff's right of ingress and egress to his contiguous lands over the dirt road across the Base property. The temporary restraining order

and order to show cause was issued in the state court.

On removal to the federal court the restraining order expired of its own limitation, and plaintiff thereupon filed his amended complaint, which was in all respects [21] identical with the original complaint except that it detailed the nature of the irreparable injury that plaintiff would suffer unless the relief prayed for was granted, and the allegation contained in Paragraph V of the original complaint was entirely omitted. This paragraph which appeared in the original complaint, but was omitted in the amended complaint, alleged that the action of the defendant, as Commanding Officer of the Base, in closing the gate across the dirt road, was in excess of his authority as such officer.

Pursuant to the prayer of the amended complaint a restraining order and order to show cause was issued out of this Court, and on hearing the Court issued its preliminary injunction. Following this the government, on behalf of the Commanding Officer of the Base, defendant herein, filed its motion to dismiss the action "because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit." The motion was based on the pleadings, records, and testimony filed and taken in the matter. Briefs were filed and argued by respective counsel, and the matter submitted to the Court for determination.

Movant argues that the Court should inquire into the interests of the government in the matter be-

cause the plaintiff seeks specific relief against the sovereign; that the injunction, if issued, must of necessity expend itself on the land of the United States, and thus the United States is an indispensable party. Plaintiff, in resisting the motion, argues that this is not a suit against the government but is a suit directed against the defendant as an individual. Thus the only issue before the Court is whether the Court has jurisdiction to entertain this action, and that turns on the proposition whether or not [22] this is in effect an action against the United States in a matter in which it has not consented to be sued, or in which it has waived its immunity from suit.

Parenthetically, it should be noted that during oral argument on the Motion to Dismiss counsel for both parties freely alluded to and argued the evidence adduced upon the hearing of the show cause order. We are of the opinion that such evidence, which is not in dispute, is properly before the Court in its consideration of this motion.

“A motion to dismiss now performs the office of the general demurrer under the former practice. Under Rule 7(c), *supra*, demurrers, pleas and exceptions for insufficiency of a complaint cannot be used, and a ‘speaking motion’ to dismiss may be utilized to present the defenses enumerated in Rule 12(b), *supra*. Affidavits, depositions and other documentary proof may be utilized when the movant seeks a dismissal of the case upon any of the first five defenses enumerated in Rule 12(b), *supra*.

The very nature of those defenses is such as to admit of proof by ex parte statements in most instances. Moore's Federal Procedure, Vol. 1, pages 646, 647 and appendix. However, the court should never grant a motion presenting any of the said defenses if any material fact is disputed by counter affidavits, depositions or documents. Where the enumerated sixth defense 'failure to state a claim upon which relief can be granted' is relied upon the court should determine the motion upon the allegations of the complaint and undisputed facts as they appear from the pleadings, orders and records of the case. (Citing case)''

Yudin v. Carroll et al,
(DC Ark, 1944) 57 F. Supp. 793

Now, on the question of lack of jurisdiction. The following rules which constitute historically sound law form the background for a consideration of this case. Suits against the government must be considered against a background of complete immunity:

"It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by Congress."

United States v. Shaw
309 US 495 [23]

Consonant with this view, it has been stated that permission to sue the sovereign will not be implied:

"It is fundamental that the United States cannot be sued without its permission, and that

permission must be specifically granted by Congress. It will not be implied.”

North Dakota - Montana Wheat Growers’
Ass’n. v. United States

(CCA 8, 1933) 66 F. 2d 573, Cert. Den. 291
US 672

And, further, that the United States

“* * * Cannot be subjected to legal proceedings,
at law or in equity, without their consent; and
whoever institutes such proceedings must bring
his case within the authority of some act of
Congress.”

Belknap v. Schield
161 US 10

The Court, in considering such suits must look into
the entire record:

“The Government’s interest must be deter-
mined in each case ‘by the essential nature and
effect of the proceeding, as it appears from the
entire record.’ Re New York, 256 US 490, 500,
65 L. Ed. 1057, 1062, 41 S Ct 588.”

Mine Safety Appliances Co. v. Forrestal
326 US 371

If the officers who are sued in their individual
or personal capacity have no individual or personal
interest in the controversy, and if the suit seeks to
control their actions and exercise of functions as
officers of the United States, the immunity from
suit is applicable.

“* * * the inference is, that where it is man-

ifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction;’ * * *’’

Belknap v. Schield

161 US 10

“Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state [24] can act, restraint of their action, which the bill of complaint prays, is restraining of state action, and the suit is in substance one against the state * * *’’

Worcester County Trust Co. v. Riley

302 US 292

“The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff’s contract, and thus prevent the inauguration of the experimental service contemplated by the Act of 1914,—a direct interference with one of the processes of Government. The argument to the contrary assumes to treat defendant not as an official, but as an individual who, although happening to hold public office, was threatening to perpetuate an unlawful act out-

side of its functions. But the averments of the bill make it clear that defendant was without personal interest, and was acting solely in his official capacity, and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do."

Wells v. Roper
246 US 335

The suit nominally against an officer will be considered one against the sovereign, if the specific relief sought will expend itself on public property.

"If the initial nature and effect of a suit is such as to make plain that the judgment sought will expend itself on public treasury or domain, or interfere with the public administration, the suit is one against the sovereign."

Land v. Dollar
330 US 371

The Supreme Court has recently ruled upon the precise question in *Larson v. Domestic and Foreign Commerce Corporation*, 337 US 682. It appears in the *Larson* case that the plaintiff had contracted to purchase coal from the War Assets Administration. A controversy arose over the construction of the contract and the War Assets Administration took the view that a breach had occurred and it was free to sell to other parties. Plaintiff sought an injunction prohibiting *Larson*, head of the WAA, from selling [25] or delivering to the other purchaser. Defendant sought to dismiss upon the

ground the Court was without jurisdiction because the suit was one against the United States. The Supreme Court held that the suit must fail; that in determining the sovereign's immunity from suit actions of an officer which do not conflict with the terms of his statutory authority, whether or not they are tortious under general law, cannot be enjoined if they would be regarded as the actions of a private principal under the rules of agency.

“We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.”

Larson v. Domestic and Foreign Corp.

337 US 682

It is fair to note that Mr. Justice Frankfurter dissented on the ground the suit was in effect one to determine whether Larson was within his authority, and the District Court did have jurisdiction over the controversy for the purpose of determining that issue. It should also be noted that the Supreme Court, after setting down the general rule

announced above, laid down two classes of cases wherein an officer of the Government might be sued, without joining the sovereign. One class is where the statute or order conferring power upon the officer to act is unconstitutional or otherwise invalid, and the other is where the officer is not acting within the statutory limitation of his powers. The plaintiff, relying on the cases of *United States v. Lee*, 106 US 196, and *Land v. Dollar*, 330 US 731, [26] seeks to bring his suit within the latter exception. Both cases are exhaustively treated in the *Larson* case, and need not be reconsidered here.

From the test laid down in the *Larson* case, which appears to culminate all prior legal thinking on the subject of Governmental immunity, if plaintiff will sue an officer of the government for some act in connection with his office under the second exception noted above, and obtain specific relief, he must get over two hurdles. First, he must plead and prove the "statutory limitation" which has been exceeded and secondly, the act must not be the act of the United States, by the application of general agency principles.

In applying the "statutory limitation" test we should go directly to the language of the *Larson* case:

"The application of this principle to the present case is clear. The very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his sub-

ordinates, into a binding contract concerning the sale of the Government's coal. There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power and the duty to construe such contracts and to refuse delivery in cases in which he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for the purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract. There is no claim that his action constituted an unconstitutional taking." (Emphasis supplied.)

Larson v. Domestic and Foreign Corp.,
supra.

And, again,

"It is important to note that in such cases the relief can be granted, without imploding the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently [27] recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies."

Larson v. Domestic and Foreign Corp.,
supra.

There has been an unfortunate choice or use of words in some portions of the Larson case which may have caused plaintiff to misconceive a remedy. Thus, “* * * if the actions * * * do not conflict with the terms of his valid statutory authority * * *” and, if the Federal officer is “acting in excess of his authority,” are examples. What the Court meant, and what the Court said in expressly treating the subject, is that a mere allegation in the complaint that the defendant’s actions were “beyond any authority conferred upon him,” or that he has “no authority,” is not sufficient. There must be some express allegation of some express statutory limitation upon the actions of the officer, and an allegation of an act in excess thereof. The complaint here completely fails in that respect.

If the “agency test” as laid down in the Larson case and considered in the light of the historical background noted above, is applied here, it is inescapable that the action of the defendant, Colonel McKenzie, were the actions of his principal, the United States of America. It was neither alleged or shown that the defendant had any personal interest in the subject easement. The defendant testified that while he had a personal view on the matter at hand, it was of no moment here. On the contrary, the positive testimony is to the effect the interest of the defendant was one of protecting perimeter lighting cables which lay under the easement, close to the surface of the earth, and which were a part of the Air Force Base Installation and United States Government property. There was

also testimony that part of the defendant's official duties was the protection [28] of the property of the government under his command. The defendant was employed by the United States of America to perform service in its affairs. It is elementary that the defendant's conduct in the performance of the service is controlled or is subject to the right to control by the United States of America. Specific relief here must, of necessity, expend itself on the public domain.

The Court is of the opinion that this suit must fail, as one against the United States of America. Our conclusion is based upon the ground that the actions of the defendant do not exceed an express statutory limitation, and are those of a private principal under the normal rules of agency.

It is Ordered that the defendant's motion to dismiss the above entitled action be, and the same is, hereby granted.

Dated at Carson City, Nevada, this 25th day of March, 1957.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed March 26, 1957.

In The United States District Court,
For The District of Nevada

No. 1293

JOHN CAVANAUGH, Plaintiff,

vs.

B. E. McKENZIE, Defendant.

TRANSCRIPT OF PROCEEDINGS ON
MOTION TO DISMISS

Before: Hon. John R. Ross, Judge.

Be It Remembered, that the above-entitled matter came on for hearing before the Court at Carson City, Nevada, on Tuesday, the 26th of February, 1957, at the hour of ten o'clock A.M.

Appearances: William O. Bradley, Esq., Attorney for Plaintiff. Herbert F. Alswede, Esq., Assistant U. S. Attorney, Attorney for Defendant.

The following proceedings were had:

The Court: Mrs. Reporter, let your record show this is matter No. 1293, John Cavanaugh, plaintiff, vs. B. E. McKenzie, defendant. The matter set for hearing at this time is motion on the part of the defendant to dismiss the cause of action, this on the ground that the Court is without jurisdiction to entertain this action because it is, in substance and effect, against the United States of America, the United States [30] having not consented to

be sued or having waived its immunity to suit. You may proceed, gentlemen.

Mr. Alswede: Your Honor, the motion presently before the Court is the motion of the defendant, B. E. McKenzie, to dismiss the action for lack of jurisdiction over the subject matter. In this regard, the defendant has three reasons for making such motion: (1) plaintiff, John Cavanaugh, has not exhausted his administrative remedies prior to suit; (2) that the suit is against an officer of the United States of America and is, therefore, a suit in effect against the United States of America; and (3) that this suit is involving rights over and to property, of which the United States government is the owner in fee simple.

Now we will take up our first proposition, that the plaintiff has not exhausted his administrative remedies. It was brought out in the hearing for preliminary injunction that John Cavanaugh, some time in the past, has applied to the United States government, through the Air Force, for an easement or a license to cross the disputed two hundred foot strip on the south section line of Section 5. His application was sent back and forth to Washington through the engineers, through the Air Force, and Mr. Cavanaugh was offered a five-year revocable license. He was informed by Col. McKenzie the fact that he was offered a five-year revocable license and made no reply, neither accepted or rejected, but remained silent. Mr. Cavanaugh has [31] an administrative remedy at hand, that of

accepting the five-year revocable license, in which event suit to enjoin the defendant, B. E. McKenzie from maintaining this fence would be unnecessary.

Our second proposition is this is a suit against an officer of the United States of America. The action is nominally directed against B. E. McKenzie as an individual and it is alleged in the complaint that the defendant, B. E. McKenzie, has acted outside of any scope of his authority conferred upon him as Commanding Officer of Stead Air Force Base. We invite the Court's attention to page 2 of the brief of B. E. McKenzie on the motion to dismiss, where proposition for injunctive relief is sought against officers of the government, it becomes the duty of the Court to inquire into the interests of the government in the controversy. This proposition is well supported by the cases outlined on page 2 of the defendant McKenzie's brief. It was brought out in the hearing for preliminary injunction that B. E. McKenzie is a colonel in the United States Air Force, appointed as such under the laws of the United States of America, pursuant to regulations of the United States Air Force, and was directed to take command of the Stead Air Force Base. Col. McKenzie is in fact Commander of the Stead Air Force Base. It is an inherent duty and an inherent right of the commanding officer of a military installation to erect such fences and such gates and take such steps as he deems [32] necessary for the security of his installation. The Supreme Court of the United States, in the case of

Larson vs. Domestic and Foreign Commerce Corp., has stated the law quite well and we have outlined it on page 6 of the defendant's brief. The Court states:

"We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency."

We submit to this Court that the actions of the defendant McKenzie in erecting the fence, maintaining the gate, do not conflict with the terms of his authority, statutory authority, that authority vested in him by the acts of Congress and determined in the Air Force regulations, whereby he was appointed Commanding Officer of the Stead Air Force Base and is charged with the security thereof.

Further, it was brought out in the hearing on preliminary injunction that the fence, the maintenance of which the plaintiff seeks to have enjoined, is located on government property. It is brought out by the testimony that the fence is located six inches within the northern part of the south section line of Section 5. The fence is on government property. Being [33] on government property, it is a government fence. The injunction then, to be of any value, must of necessity extend itself on government property and upon the lands of the United States of America and if you have an injunction that extends itself upon government property and upon government lines, we submit that the

United States of America must be made a party to the action, and not consenting to be joined as a party to the action and not having waived its immunity from suit, that this Court has no jurisdiction to proceed in the matter farther.

Our third proposition is that this suit involves an easement over government property. Plaintiff has alleged in his complaint that he has an easement over a two hundred foot strip on the south side of the southwest quarter of Section 5. It was denied in open court by Col. McKenzie, the Commander of the Stead Air Force Base or the Installations Officer, who is in possession of the legal records dealing with the real estate of Stead Air Force Base, that no easement across that property exists. We should like to invite the Court's attention to the fact that the Court must necessarily decide whether or not the plaintiff, John Cavanaugh, has an easement across this two hundred foot strip before the Court could decide whether or not the obstruction is wrongful. If there is no easement, there could be no wrongful obstruction. The fact whether or not there is an easement has been put in issue before this Court. The Court must then necessarily decide whether the plaintiff, [34] John Cavanaugh, has an easement across the property. It has been admitted by John Cavanaugh, in the hearing on the preliminary injunction, that the United States of America owns title to the two hundred foot strip over which he claims an easement. The proposition determining the rights of third persons to lands owned by the United States was brought before the

Supreme Court in the case of *Minnesota vs. United States*, 305 U. S. Reports, reported at page 382. In this case the State of Minnesota sought to condemn a right-of-way for easement across property owned by the United States in fee simple. The Court held that:

“The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. (citing cases.) It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right-of-way cannot be condemned without making it a party. The exemption of the United States from being sued without its consent extends to a suit by a State. (Citing cases.) Hence Minnesota cannot maintain this suit against the [35] United States unless authorized by some act of Congress.”

So it should also extend to a suit by private citizens. We submit to the Court that this suit may not be maintained, in view of the immunity of the United States from being sued and that the United States is a necessary and proper party to be joined in any action in which the property of the United States is involved and in which a third party seeks to condemn an easement or right-of-way.

In closing I should like to direct and invite the Court's attention to the prayer in paragraph 3 of the plaintiff's complaint, wherein the plaintiff asks that the defendant and his successors in interest be

enjoined from maintaining any fence or gate. I ask successors in interest to what? If this is a suit directed to B. E. McKenzie as an individual, and not acting in the scope of his authority, do we have any successors in interest? I submit this is, in effect, an admission by the plaintiff that this is a suit against B. E. McKenzie as Commanding Officer of Stead Air Force Base and his successors in interest, referred to in paragraph 3 of the prayer for relief in the plaintiff's complaint relates to any other commanders of Stead Air Force Base which follow Col. McKenzie, that this is then a suit against an officer of the United States and it is a suit involving government property, which the Court must necessarily determine whether or not there [36] is an easement and that all administrative remedies have not been exhausted. I, therefore, submit that the Court does not have jurisdiction to proceed further in the matter and ask that the case be dismissed.

The Court: I observe, counsel, that you said in your discussion that this involves a controversy over an easement on property, the fee of which was owned by the United States. I assume your position is that the United States has fee title to the two hundred foot strip?

Mr. Alswede: That is correct, your Honor.

The Court: Which is involved here. Now I observe that in the brief filed in support of the motion, you make the statement that the plaintiff alleges that the defendant obstructed plaintiff's means of ingress to and egress from plaintiff's

property by maintaining a locked gate and fence on government property. Now is there any controversy between the parties there that this property is fee property of the government and not property in the nature of public domain?

Mr. Bradley: Where the obstruction exists, your Honor?

The Court: Yes.

Mr. Bradley: We maintain that this is on the section line. [37]

The Court: That is true, I recall that it is your contention that counsel has said it is six inches within, but assuming that to be true, the two hundred foot strip is fee property of the government, not public domain?

Mr. Bradley: On that point, your Honor, I would not stipulate. That particular land, as I recall, was owned by the Farmers Home Administration, as I recall, and what disposition they have made of it, I wouldn't be in position to say. It is owned by the government.

The Court: But in any event, it would have been withdrawn from the public domain as we know it, and was not open to acquisition by private individuals in the nature of homesteading or acquisition. You may proceed, Mr. Bradley.

Mr. Bradley: First, your Honor, may it please the Court, in response to Mr. Alswede's motion, the first item that the plaintiff has not exhausted his administrative remedies, the basis of our action in this matter is that we have an existing right-of-

way as a matter of law. That has been terminated by an act, in excess of the authority of the Commanding Officer of Stead Air Force Base. The question of administrative remedies, in my opinion, does not enter into the matter. We do not seek to appeal from the offer of a revocable five-year license, in lieu of our right, as a matter of law, to an easement across the [38] property. In addition, your Honor, we have no quarrel with the case of *Minnesota vs. United States*, or the case of *Utah Power & Light Company vs. United States*, cited by Mr. Alswede in his brief. The case of *Minnesota vs. United States* was a condemnation proceeding, in which a state sought to condemn a right-of-way across land owned by the United States government. I would certainly be the first to concede that the United States is an essential party to such an action. In this particular case, your Honor, we contend that upon transfer of the land by the United States government to the Farmers Home Administration, an easement came into being as a matter of law, to which Mr. Cavanaugh's property is entitled as a matter of law and which Mr. McKenzie had no right to terminate. It is axiomatic, your Honor, that upon motion to dismiss the complaint of the plaintiff must be considered in the light most favorable to the plaintiff and all allegations well pleaded are deemed true. In support of that contention, I cite the case of *Coole vs. International Shoe Co.*, 142 Fed. (2), 318, 93 Fed. Supp., 773. We have pleaded ownership of the property, to which our access has been restricted. We plead

an easement in existence, and we plead a wrongful termination of that easement by Col. McKenzie.

With reference to the proposition that it is beyond Mr. McKenzie's authority to terminate the existing easement, we have no better authority for that statement than Col. McKenzie [39] himself, your Honor. You recall on the hearing to show cause, Col. McKenzie testified that he had no authority to terminate existing easements. The case of *Larson vs. Domestic & Foreign Corporation*, cited by Mr. Alswede in his brief, is absolutely in conformity with plaintiff's position in this matter, your Honor. I read from page 6 of Mr. Alswede's brief:

"We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign."

The case holds that where the actions do not conflict with the statutory authority, they are the actions of the sovereign. Where they do conflict, they are not the actions of the sovereign. That line of cases is the great weight and authority in the Supreme Court of the United States, your Honor.

Another case cited in defendant's brief is the case of *Land vs. Dollar*, [40] in the Supreme Court of the United States, on exactly the same point.

In *Land vs. Dollar* case, Mr. Dollar had pledged securities with the United States Maritime Commission in return for a loan of money. He repaid the loan and requested those securities be returned. The Maritime Commission took the position that the securities had become the property of the United States government. Mr. Dollar then instituted suit against the Maritime Commission for wrongfully detaining his property and sought to have the property returned. The government's defense to the action was that was, in effect, a suit against the sovereign, to which the sovereign had not consented, and the court, therefore, did not have jurisdiction. The Supreme Court rejected that contention and held the officers were wrongfully withholding property of Mr. Dollar, took jurisdiction and made the officers of the United States Maritime Commission return the stock.

The main case, your Honor, that all these cases rely on in this question of sovereign immunity is the case of *United States vs. Lee*, 106 U. S. In the case of *United States vs. Lee*, your Honor, the plaintiff was the daughter of the granddaughter of General Robert E. Lee and she allegedly owned sixty acres within the Arlington National Cemetery, known as the Arlington Estates. Two military officers, one named Kaufman and one named Strong, rejected Mrs. Lee's claim to her property. [41] They contended it was property owned by the

United States government. Mrs. Lee instituted suit in the State court in Virginia against Kaufman and Strong individually. The case went to trial and the government ultimately contended that it was in effect a suit against the United States government, to which the United States had not consented, and that the Court, therefore, had no jurisdiction. The Supreme Court of the United States rejected this contention and the opinion written by Chief Justice Miller holds as follows, and I quote from the decision:

“Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right.” [42] The Supreme Court goes on to hold, your Honor, and I quote again from the decision:

“In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his

action, and the State may stand behind him as a real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

In our case, your Honor, our pleadings are clear. We plead against Col. B. E. McKenzie. We allege he is the Commanding Officer of the Stead Air Force Base; we do not deny that. We also allege he exceeded his statutory authority in terminating an easement that existed, not an easement which we seek to condemn. Mr. Justice Miller went on to say:

"In the case supposed, the court has before it a plaintiff capable of suing * * *"

As we have here, your Honor:

"* * * A defendant who has no personal exemption from suit and a cause of action cognizable in the court; * * *"

Exactly what we have here. In the United States vs. Lee the [43] defendants were military officers also:

"* * * a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he *assets* in his declaration."

Now as Mr. Alswede pointed out, your Honor, the Court must necessarily decide whether or not we have an easement. We have alleged it. How can the Court decide whether or not the easement

exists without assuming jurisdiction? To follow the position of the United States government in this case and Mr. Alswede in this case, to its logical conclusion would ultimately result in a situation as far-fetched as this, your Honor—assume that an officer of the government, assertedly acting within his authority, should place a cordon around some private property owned by an individual and say, “You are denied access to your property.” Even though the access is way beyond the authority of the officer, he denies access to the property. Then when the individual, whose rights have been denied, comes to court for relief, they stand up and say, “You can’t raise the question; the Court has no jurisdiction. It is a question of sovereign immunity. The man was acting as an officer of the government, in his capacity as an officer of [44] the government, therefore the right or wrong of his acts cannot be questioned. It is in effect a suit against the United States government, a suit against the sovereign, to which the sovereign has not consented.” Justice Miller, in the case of *United States vs. Lee*, saw the danger that existed in such a theory and rejected it. The Supreme Court of the United States, in all cases that have come down on that point, have rejected that proposition. The case of *Land vs. Dollar* is in conformity with *United States vs. Lee*, as is the case of *Larson vs. Domestic & Foreign Corporation*.

The law on this question, your Honor, has been well stated in the case of *Rank vs. Krug*, 90 Fed. Suppl., page 773. In that case the plaintiffs brought

suit against several officials of the Bureau of Reclamation in their individual capacity, alleging that they had exceeded their authority in withholding water property rights which they had no right to do and sought a mandatory injunction from the Court, requiring the officers involved to release the water. The action was filed in the State court of California and removed to federal court. Upon removal, the government moved for dismissal, on the ground that the United States was an indispensable party, was in effect a suit against the United States, to which the United States had not consented. In that case, your Honor, the Court said:

“It is contended that the United States is [45] an indispensable party; that this is in effect a suit against the United States, and that no permission has been given to sue the United States in such an action. But as seen from the foregoing discussion the defendants in withholding the water from the plaintiff’s use, and threatening to do so, are exceeding any powers granted to them by the Act of Congress. That being so, neither the United States nor the Secretary of the Interior are indispensable parties, and this is not a suit against the United States. The situation falls squarely within the doctrine of the test whether or not an injunctive decree would expend itself upon the United States because of authorization of the alleged taking of the plaintiff’s rights by an Act of Congress, or will prevent the defendants from doing acts which are unlawful because not authorized.

“In view of the fact that no statutory authority

exists for the actions of the defendants, and that they are withholding water from the plaintiffs in excess of and contrary to the powers conferred upon them, such a decree obviously brings the situation clearly [46] within the line of cases *if* *United States vs. Lee*, *Philadelphia Company vs. Stinson* * * *”

all Supreme Court cases:

“*Ickes vs. Fox* * * *”

and so forth. That is exactly our position here.

Now I feel that the Court must construe our pleading, you must take the allegations of our complaint as true, for the purposes of considering this motion to dismiss. In the complaint we allege an easement as a matter of law. We have an easement. That easement was wrongfully terminated by Col. McKenzie because Col. McKenzie himself testified that he had no power or authority either to grant a permanent easement or to destroy a permanent easement that was in existence. Therefore, your Honor, the case falls squarely within the decision of *United States vs. Lee*, *Rank vs. Krug*, *Land vs. Dollar*, and so on.

The next point, your Honor, which I touched on briefly in our opening and touch briefly again, is the proposition for which the government has cited the case of *Minnesota vs. United States*, that if you are seeking to condemn right-of-way across government property, the United States is an indispensable party. I agree with that myself. That is not the situation here. Here we seek to have our existing easement confirmed. I therefore, your Honor,

respectfully request that the motion be denied and the defendant be required to answer forthwith. [47]

The Court: Anything further, Mr. Alswede?

Mr. Alswede: May it please the Court, in answering the plaintiff's contention that there is an easement in being and that the Court is merely confirming the easement, first I would like to invite the Court's attention to the fact established in the hearing for temporary injunction, the admission by the plaintiff, John Cavanaugh, that he applied for an easement across this strip of land owned by the government. I submit, if he had an easement, your Honor, why would he apply then to the United States Air Force and to the United States for an easement, if he already had it? It seems to me he wouldn't re-apply for it. I think that this is admission on the part of the plaintiff that he had no easement; and, second, I invite your attention to the admission of plaintiff's counsel that the Court must necessarily decide that the plaintiff has an easement. In deciding whether there is an easement or there is not an easement, the Court is adjudicating the plaintiff, John Cavanaugh's rights in property owned by the United States of America. In doing so, I resubmit that the United States of America is an indispensable party, since it is the owner in fee simple of that property, and any rights which John Cavanaugh may have in that property would necessarily detract from the rights which the United States of America has; that, therefore, the United States of America is an indispensable party, and since the United States of

America [48] has not consented to be sued or joined in this action, it has not waived immunity, that the Court does not have jurisdiction to proceed further, and we ask that the action be dismissed.

The Court: There is no question involved here, is there, that this easement, if one does exist and if it is directed to the plaintiff, would interfere with the military potentialities of the Reservation?

Mr. Alswede: Would you restate the question, your Honor?

The Court: Simply it is this—do we have any question of interfering with the military purposes of the Air Base?

Mr. Alswede: Yes, your Honor, I believe if this easement was adjudicated in favor of Mr. Cavanaugh that it would materially affect the rights of the United States and the United States Air Force.

Mr. Bradley: Your Honor, may I call to your attention, sir, the case of *Meigs vs. McClung*, 9 Cranch 11. In that case, your Honor, a Supreme Court case, the property sued for was land on which the United States had a garrison erected at a cost of thirty thousand dollars, and the defendants were the military officers in possession and the very question now in issue was raised by these officers. They insisted that the action could not be maintained against them [49] because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction. They further insisted that the United States had a right, by the

Constitution, to appropriate the property of the individual citizen. The Court below overruled these objections and held that the title being in plaintiff he might recover, and that if the land was private property, the United States could not have intended to deprive the individual of it without making him compensation therefor.

Mr. Alswede: In reply to that, your Honor, we think it would be well to point out that in that instance the United States merely was occupying the land and did not have fee simple title, which we do have in this case.

The Court: Do either counsel desire to submit further arguments in the matter?

Mr. Alswede: I am willing to submit it on the oral argument.

Mr. Bradley: I will submit it on oral arguments.

The Court: The record will show that the motion, being argued, it is taken under advisement. [50]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between Counsel for the plaintiff and defendant that the Transcript of Proceedings on the hearing of defendant's motion to dismiss inadvertently by virtue of a clerical mistake omitted the following proposition argued by William O. Bradley at

the hearing on the motion to dismiss; that the Transcript of Proceedings be corrected pursuant to Rule 60 A, Federal Rules of Civil Procedure, to include the following argument urged by Mr. Bradley at the hearing on defendant's motion to dismiss:

"The easement pleaded by Mr. Cavanaugh in his Amended Complaint on file herein is an incorporeal hereditament, which is a property right. The defendant, Colonel B. E. McKenzie, in terminating this easement absolutely destroyed a property right owned by Mr. Cavanaugh, which constitutes a deprivation of property without due process of law contrary to the Fifth Amendment of the Constitution of the United States of America."

Dated this 1st day of April, 1957. [52]

GRUBIC, DRENDEL &
BRADLEY,

/s/ By WILLIAM O. BRADLEY,
Attorneys for Plaintiff.

/s/ HERBERT F. AHLSEDE,
Assistant United States Attorney, Attorney for Defendant.

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

ORDER

Pursuant to written stipulation entered into between Counsel for the respective parties herein,

It Is Hereby Ordered that the Transcript of the Proceedings on the hearing on defendant's Motion to Dismiss be, and the same hereby is, amended to include the following proposition argued by Mr. Bradley in opposition to defendant's Motion to Dismiss, but inadvertently omitted from the Transcript by virtue of a clerical error:

"The easement pleaded by Mr. Cavanaugh in his Amended Complaint on file herein is an incorporeal hereditament, which is a property right. The defendant, Colonel B. E. McKenzie, in terminating this easement absolutely destroyed a property right owned by Mr. Cavanaugh, which constitutes a deprivation of property without due process of law contrary to the Fifth Amendment of the Constitution of the United States of America."

Dated this 2nd day of April, 1957.

/s/ JOHN R. ROSS,
District Judge. [54]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE

TESTIMONY OF B. E. McKENZIE

Be It Remembered, that the above-entitled matter came on for hearing before the Court at Carson City, Nevada, on Friday, the 8th of February, 1957, at the hour of two o'clock P.M.

Appearances: William O. Bradley, Esq., Attorney for Plaintiff. Franklin P. Rittenhouse, Esq., United States District Attorney and Herbert F. Alswede, Esq., Asst. United States Attorney, Attorneys for Defendant.

The following proceedings were had:

The Court: Mrs. Reporter, let your record show that this is the time set for the hearing on order to show cause and temporary restraining order issued in the matter of John Cavanaugh, plaintiff, vs. B. E. McKenzie, defendant, action No. 1293. The order was entered February 4th of this year, at the hour of 11:40 A.M. You may proceed, gentlemen. [55]

B. E. McKENZIE

being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Alswede): Would you state your name and occupation? A. Burton E. McKenzie.

Q. And your occupation?

(Testimony of B. E. McKenzie.)

A. Colonel United States Air Force, Commanding Officer Stead Air Force Base.

Q. Now, Colonel, are you familiar with the complaint that has been filed in this action?

A. I am.

Q. And the map that is attached thereto?

A. Yes.

Q. In this complaint and amended complaint that is on file, the plaintiff has alleged that you have caused a padlocked gate to be placed across government property and have maintained a fence, which is obstructing his means of ingress to and egress from his property. Was this fence and gate in existence at the time you took command of the Air Base?

A. Yes, sir.

Q. And when did you take command of the Air Base?

A. July 20, 1955.

Q. And since that time has the gate been kept locked and the fence maintained across government property?

A. Yes. The fence was constructed long before my arrival at this station as a former boundary fence on the property. It [56] has been there, to my knowledge, for some time prior to, and to my knowledge since, I have been there.

Q. And you are maintaining the fence and the gate?

A. We are.

Q. Will you tell the Court why you are maintaining the fence and the gate?

A. Well, as in the case of any military reserva-

(Testimony of B. E. McKenzie.)

tion, the border fence is protected and maintained for security purposes and the boundary definition of the government reservation.

Q. And are you maintaining this fence and gate in the exercise of your command as the Commanding Officer of Stead Air Force Base?

A. Due to the fact that I am responsible for the security of the government property within the fence, we are.

The Court: Is that fence in that area, Colonel, the military property fence, I mean in the immediate area?

A. Yes, sir, there is a fence and right close to that near the other building that joins it.

Q. Is that your fence too, the government fence?

A. Yes.

Q. It too is a part of the enclosure fenced on government reservation?

A. Yes, sir. It is the exterior boundary of our lines.

Q. What I am getting at is this, does Mr. Cavanaugh have any [57] drift fence or boundary fence abutting against the reservation, the boundary lines? A. I couldn't say, sir.

Q. In that particular area?

A. Not to my knowledge.

The Court: I ask these questions because there is attached to the complaint a map, which does not mean very much to the Court. I do not know from it where Mr. Cavanaugh is attempting to go

(Testimony of B. E. McKenzie.)

over, from what direction, and consequently I am up in the air.

Mr. Bradley: Your Honor, I will explain that. I have the plat of the map here, your Honor.

Mr. Alswede: We have no further questions.

The Court: You said, Colonel, that this particular fence, with which we are concerned, had been erected and maintained for, so far as you know, considerable time before you came to the Base in 1955?

A. That is correct, sir. In addition, I have government notices posted on the fence.

Q. And you say that since your coming there, the fence has been maintained? A. Yes, it has.

Q. And I assume when you state that, you mean that the gate was also maintained? [58]

A. That is correct, sir. The gate, as I understand it, was originally placed at this particular location to facilitate the power company ingress and egress to maintain power lines there on our Base.

Q. Has that gate been kept actually locked?

A. Yes, sir, until approximately two weeks ago, when I received temporary restraining order, at which time I directed that the gate be unlocked.

Q. If a person desired to have ingress or egress through the gate, prior to the service of the restraining order on you, it would be necessary for that person to receive a key from some authority?

A. Yes, sir.

Q. That was the practice you followed?

(Testimony of B. E. McKenzie.)

A. Yes, sir.

Q. During the period of time that you have been at the Base, since 1955, have you permitted this plaintiff to use the gate? A. Yes, sir.

Q. And on each instance has he made request of you or your proper officer for the key?

A. Yes, sir.

Q. And returned it?

A. I don't know whether he was required to return it.

Q. And he obtained permission?

A. Yes, sir, with one exception. Originally, early in the month [59] of August he, or his workmen, did go through the gate by tearing it down, which is the first time, to my knowledge, he had used that point of egress. At a later date, when he requested permission to enter, in order to protect the two buildings he had, I gave him written permission to do so for a period of two weeks and also he did go on six weeks, at which time he winterized the buildings, not being a permanent easement, which I am not empowered to give.

Q. Do you know whether or not this fence is actually on or within the boundary lines of the federal property?

A. I couldn't say whether it is on the property line or within the property line.

Q. Would you say that was near, on, or within the property line?

A. I presume it to be on the property line.

Q. That also applies to the gate?

(Testimony of B. E. McKenzie.)

A. Yes, sir.

The Court: I have no further questions.

Cross Examination

Q. (By Mr. Bradley): Colonel McKenzie, you stated that the fence and gate were quite delapidated when you took command at the Stead Air Force Base?

A. No, sir, I did not say that. I feel it serves the purpose.

Q. Are you familiar with the current boundaries of Stead Air Force Base?

A. I have in my installation officer's files surveys of the [60] Base, aerial photos.

Q. I show you, Col. McKenzie, a map entitled "Real Estate Reno Air Base and Bombing Range Military Reservation." By looking at this, can you determine the present boundaries of Stead Air Force Base?

A. No, sir, I could not.

Q. This fence, Col. McKenzie, that you assume is on the property line, are you aware of how much government property is immediately north of the fence?

A. Approximately two hundred feet by something like two miles.

Q. Approximately two hundred feet in depth by approximately two miles in length, is that correct?

A. Yes.

Q. Then beyond two hundred feet, that is on the south half of Section 5, that would be the east half of the west half of Section 5, there is a two

(Testimony of B. E. McKenzie.)

hundred foot strip there in depth with government fence, is that correct? A. Yes, sir.

Q. Then from the northerly end of that two hundred foot strip, approximately how far is it until you again reach any more government owned property, part of the Air Force Base?

A. That is a matter of approximately another mile and a half.

Q. Are you familiar with the ownership of the property in Section 5 north of the two hundred foot strip, Colonel?

A. I believe that is Mr. John Cavanaugh. [61]

Q. Are you familiar with the ownership of Section 5 in its entirety?

A. I couldn't tell you what Section 5 comprises without looking at the chart now.

Q. May I ask you this, Colonel, when you came into command at Stead Air Force Base, was the old Purdy highway visible to you in Section 5?

A. Parts of it. Parts of it are washed out. From the map I am not sure that is in Section 5.

Q. In the area that we have included in this map, are you familiar with the property in question, so that the map has any meaning to you, Colonel? A. Yes, I think so.

Q. Colonel, I show you on this map Section 5 and the map designates the old Purdy highway, is that correct?

A. I do not think that is correct, sir.

Q. In what respect is it not correct?

A. I am not positive, but I think that the old

(Testimony of B. E. McKenzie.)

Purdy highway, if it exists at all, that this fence does not go across this fence corner. However, by looking at the photo, I couldn't say.

Q. As far as the old Purdy highway enters into Section 5, Mr. Cavanaugh's ownership is in the east half of the west half of Section 5?

A. As far as I know this is correct, except for the actual [62] location of that point crossing this line, I am not sure.

Q. Are you familiar with the dirt road that goes into what is designated present gate on the map? A. Yes, sir.

Q. Is that road plainly visible on the ground?

A. Yes, sir.

Q. Was that plainly visible at the time you took command at Stead Air Force Base in 1955?

A. I do not remember.

Q. Colonel, do you have anything to do with the real estate division of the Farmers Home Administration of the United States government?

A. No.

Q. I show you a deed from the United States of America by the Federal Farm Mortgage Corporation to George William Burke.

Mr. Bradley: Your Honor, at this time I would like to offer this deed into evidence. It is a certified copy of the deed.

The Court: While we are waiting, counsel, I assume the white copy of the map that you presented to the witness is identical with the black copy. The map indicates that as to Section 5, the government

(Testimony of B. E. McKenzie.)

owns all of the area in that section enclosed within the heavy broken line. Does your map have that type of line upon it? (Conference at the bench between court and counsel.) [63] Very well, counsel has corrected the Court. The map we are referring to indicates that all of Section 6 belongs to John Cavanaugh, with the exception of the west one-half of the west half of Section 5, together with a sort of corridor, which would be at the south end of the southeast quarter of the southwest quarter of Section 5, and I assume that is the parcel which counsel alludes to as being two hundred feet in width.

A. That is correct, your Honor.

Mr. Bradley: If you have any questions, your Honor, that this two hundred foot strip does not actually extend to the east; in other words, this line, heavy line, should continue.

The Court: The corridor on the south end of Section 5, clear across:

(Off the record discussion.)

Mr. Bradley: I will withdraw the offer of that deed at this time. I will wait until we go into my case in chief.

Q. Colonel, what maintenance have you employed on this fence during the time you have been here?

A. The only maintenance that I have been concerned with personally was to repair the fence after Mr. Cavanaugh or his workmen went through it.

Q. You have not ordered any other construc-

(Testimony of B. E. McKenzie.)

tion on the fence at all during the time you have been there? [64]

A. We did replace government property signs. Other than that, I am not aware of any construction.

Q. Have you replaced any fence posts?

A. That, sir, is the responsibility of my area installation engineer. I wouldn't know.

Q. You don't know whether any fence posts were replaced, any wires tightened?

A. I don't know.

Q. Colonel, do you know who installed that fence? A. No, I do not.

Q. You have no knowledge of that at all, is that correct? A. No.

Q. When did you first put a padlock on the fence, Colonel?

A. When the existing padlock was broken or removed in August of 1955.

Q. There was a padlock on there all the time prior to that time?

A. To the best of my knowledge.

Q. But you don't know whether there was or not?

A. I do not know. To the best of my knowledge there was. It had been broken. It was hanging there.

Q. Do you know whether or not, of your own personal knowledge, there had been a padlock on that gate all the time from the time you took command down to August 1, 1955?

(Testimony of B. E. McKenzie.)

A. Not to my personal knowledge.

Q. Do you know who owned that padlock that was on that gate? [65] A. No.

Q. Was it an United States government padlock? A. I do not know.

Q. You don't know who had the key? You did not?

A. No. I assume my installation engineer had that.

Q. But you did not? A. I did not.

Q. Colonel, did you ever issue orders to any of your men to restrict Mr. Cavanaugh, or his employees, from crossing that two hundred foot strip?

A. Yes; in my absence, my deputy did that.

Q. On your order, sir?

A. No, I wasn't here. It was in my absence; however, I assume the responsibility. At a later date, after giving Mr. Cavanaugh permission to winterize for two weeks and subsequent to that date about six weeks, I directed the gate to be locked again. At the time I found Mr. Cavanaugh or his employees had poured two additional foundations.

Q. Now this padlock, from the one you had up to that time, is evidently different lock on the gate. Did you put on a new lock?

A. I put on a padlock. I don't know whether it is the same one.

Q. And you ordered that gate to be padlocked at that time? A. That is correct.

Q. Did you issue orders to any of your men to

(Testimony of B. E. McKenzie.)

order any of Mr. Cavanaugh's men off this property? [66] A. No, I did not.

Q. But there were orders came out that you assume responsibility for, keeping Mr. Cavanaugh from crossing that two hundred foot strip, is that correct?

A. No. I wrote a letter to Mr. Cavanaugh, explaining that the temporary permission to enter was rescinded, due to the fact that he had performed construction in addition to that for which the temporary permission was given.

Q. Colonel, were you particularly concerned about the construction or his right of ingress and egress?

A. I was concerned only about his right-of-way or right of ingress or egress.

Q. What does that have to do with this construction, sir?

A. In this manner—I don't have the authority to grant a permanent right of entry. If Mr. Cavanaugh were allowed, by my permission, to complete his development of 168 living units, I would, by implication, have given him a permanent right of ingress and egress. For that reason I advised Mr. Cavanaugh of the proper manner in which to obtain a right of entry.

Q. Colonel, do you generally have authority to issue a right of entry?

A. A temporary right.

Q. Do you have authority to take away a right of entrance which is in existence? A. No.

(Testimony of B. E. McKenzie.)

Q. Your answer to that question is no?

A. That is correct.

Mr. Bradley: That is all I have.

Redirect Examination

Q. (By Mr. Alswede): Colonel McKenzie, did Mr. Cavanaugh ever apply to you for a permanent right-of-way or easement be granted him across this property in question?

A. Yes, in August of last year, after he had moved the buildings, at which time I explained to Mr. Cavanaugh it was beyond my authority to grant, and also explained to him how he should apply for an order and I forwarded his application to headquarters in Washington.

Q. He did apply for an easement, then, across this two hundred foot strip at the location of the gate which is now in question? A. Yes, sir.

Mr. Alswade: No further questions, your Honor.

Recross Examination

Q. (By Mr. Bradley): Colonel, this right-of-way that Mr. Cavanaugh applied for, did Mr. Cavanaugh ever accept that? A. No, sir.

Mr. Bradley: That's all.

The Court: What was that question?

Mr. Bradley: I asked him if he knew whether or not Mr. Cavanaugh accepted the right-of-way that was proffered by the Air Force. The answer was no. [68]

The Court: I didn't know there was any offer to him other than a temporary right of entry.

(Testimony of B. E. McKenzie.)

Mr. Bradley: I believe the Colonel stated, your Honor, that a temporary right-of-way was proffered by the Air Force.

A. Mr. Cavanaugh applied for housing, which we forwarded to Washington, United States Air Force. The decision has to be made by the Department of Air Force. They decided to grant Mr. Cavanaugh a right of entry, with certain reservation provisions, if he would agree to that. Direction was sent to the corps of engineers to negotiate with Mr. Cavanaugh and the last time I inquired from the corps of engineers, possibly a week ago, he had not accepted the permanent right of entry.

The Court: Do you recall, Colonel, briefly the reservations that were attached to that offer?

A. One, your Honor, was a fifty dollar fee, I believe, for the construction of the gate. Another was a provision wherein if, in the future, it was determined by the Secretary of the Air Force, or words to this effect, that the housing development were sub-standard, the Secretary of the Air Force could withdraw the license.

The Court: We are all agreed on the proposition that this building division of Mr. Cavanaugh was ultimately designed to house personnel of your Air Base?

A. I do not know, sir, what Mr. Cavanaugh intended. [69]

Q. Were there any other restrictions?

A. Not that I recall, your Honor. You understand that this document was not given to me to

(Testimony of B. E. McKenzie.)

offer to Mr. Cavanaugh. It was given to the corps of engineers.

The Court: Yes. I was just asking for your best knowledge of it. I have no further questions.

Redirect Examination

Q. (By Mr. Alswede): I would like to clarify one point, your Honor. This easement that you speak of which was offered to Mr. Cavanaugh, was that not in effect a five-year revocable license, rather than an easement?

A. I believe that is correct.

Q. Then it was not a permanent easement that was offered, but merely a five-year revocable license?

A. That is possible, to the best of my knowledge.

Q. And he did not accept the five-year license?

A. That is correct.

Mr. Alswede: That is all.

Mr. Bradley: I have no further questions.

The Court: There is the technical proposition—and I do not indicate it is not important—of maintaining the integrity of the government's title and not permitting adverse uses to be acquired against it, such as easement, is that the only problem involved here? There seems to me to be a shadow [70] lingering in the background as to this development of Mr. Cavanaugh's.

A. Well, that is not a concern of mine, sir. There is one question bearing in the problem, and

(Testimony of B. E. McKenzie.)

that is the granting of a permanent easement by implication, which I could not do.

The Court: I can well understand it is part of your official duties, as I say, to protect the integrity of the government's title, and that absolutely is what you are doing. A. That is right.

The Court: Sometimes there is a little background information to these things and that is why I asked that question.

A. My personal opinion on Mr. Cavanaugh's development would have no bearing on my authority.

The Court: Yes, I understand. Is there anything further of this witness?

Recross Examination

Q. (By Mr. Bradley): I believe the Colonel stated it was beyond his authority to grant a permanent easement, and you also testified it was beyond your authority to take away an existing easement.

Mr. Alswede: That is not a question.

The Court: There was some question asked, but perhaps the Colonel did not quite understand. If there was a permanent easement replaced by law, I presume [71] the Colonel would recognize it.

Q. I meant, he would not have authority to take it way.

A. Are you referring to my temporary permission I gave Mr. Cavanaugh for two weeks?

Q. No. Were there a permanent easement in

(Testimony of B. E. McKenzie.)

existence in this area, would it be within your authority to take that away? A. No, sir.

(Witness excused.) [72]

[Endorsed]: Filed April 3, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that John Cavanaugh, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting defendant's Motion to Dismiss the above entitled action entered in this action on March 27, 1957.

Dated this 29th day of March, 1957.

GRUBIC, DRENDEL &
BRADLEY,

/s/ By WILLIAM O. BRADLEY,
Attorneys for Appellant. [74]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, An Order granting defendant's motion to dismiss the above entitled action was entered in the above entitled action on the 27th day of March, 1957, in the United States District Court for the District of Nevada; and,

Whereas, the Appellant, John Cavanaugh, feel-

ing aggrieved thereby, has prosecuted his appeal to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the Hartford Accident and Indemnity Company, a Connecticut corporation authorized to transact a surety business in the State of Nevada, in consideration of the premises, hereby undertakes in the sum of Two Hundred Fifty Dollars (\$250.00) that if the Order so appealed from is affirmed, or the appeal is dismissed, the Appellant, John Cavanaugh, shall pay to the defendant above named all costs awarded against him on said appeal, or such costs as the Appellate Court may award if the Order is modified.

Dated this 29th day of March, 1957.

[Seal] HARTFORD ACCIDENT AND
 INDEMNITY COMPANY,
/s/ By JAMES E. SLINGERLAND,
 Attorney-in-Fact. [75]

Notary Certification Attached. [76]

[Endorsed]: Filed April 2, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S.
DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby

certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of April, 1957.

[Seal] /s/ OLIVER F. PRATT,
Clerk, U. S. District Court. [77]

[Title of District Court and Cause.]

ORDER

This Cause came on to be heard on defendant's Motion to Dismiss the action on the ground that the Court is without jurisdiction to entertain this action because it is in substance and effect against the United States of America, the United States not having consented to be sued or not having waived its immunity from suit; and the Court having heard the argument of counsel and it appearing to the Court that the Court is without jurisdiction,

It Is Ordered that this Action be, and the same is hereby, dismissed.

Dated this 25th day of March, 1957.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed July 31, 1957.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice Is Hereby Given that John Cavanaugh, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting defendant's Motion to Dismiss the above entitled action filed in this action on July 31, 1957.

Dated this 1st day of August, 1957.

GRUBIC, DRENDEL &
BRADLEY,

/s/ By WILLIAM O. BRADLEY,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 2, 1957.

[Endorsed]: No. 15530. United States Court of Appeals for the Ninth Circuit. John Cavanaugh, Appellant, vs. B. E. McKenzie, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 19, 1957.

Docketed: April 26, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15530

JOHN CAVANAUGH,

Appellant,

vs.

B. E. McKENZIE,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant intends to rely upon the following points:

1. The Court erred in granting Appellee's Motion to Dismiss on the grounds that the suit was in effect a suit against the sovereign to which the sovereign had not consented, because,

(a) The action of Appellee, B. E. McKenzie, in destroying Appellant's right-of-way to his property and depriving him of the use of his property constituted a deprivation of Appellant's property by the Appellee without due process of law contrary to the Fifth Amendment of the Constitution of the United States of America, and is therefore not the action of the sovereign but the action of Appellee, B. E. McKenzie, and therefore the Motion to Dismiss should be denied.

United States vs. Lee, 106 U.S. 196, 27 L. Ed. 171, and cases cited therein

Land vs. Dollar, 1949, 330 U.S. 731, 67 S.

Ct. 1009, 91 L. Ed. 1209, and cases cited therein.

Larson vs. Domestic and Foreign Commerce Corp., 337 U.S. 682, 93 Law Ed. 1628, and cases cited therein.

Dated this 26th day of April, 1957.

GRUBIC, DRENDEL &
BRADLEY,

/s/ By WILLIAM O. BRADLEY,
Attorneys for Appellant.

Service of Copy Acknowledged.

[Endorsed]: Filed May 1, 1957. Paul P.
O'Brien, Clerk.

No. 15531

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. ABRAMSON and HOWARD MILLER,

Appellants,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate
of Feldman-Selje Corporation, Bankrupt,

Appellee.

Reply Brief of George Gardner as Trustee in Bank-
ruptcy of the Estate of Feldman-Selje Corpora-
tion, Bankrupt, Appellee.

SAMUEL A. MILLER,

700 Lane Mortgage Building,

208 West Eighth Street,

Los Angeles 14, California,

Attorney for Trustee, Appellee.

FILED

SEP 25 1957

PAUL P. O'BRIEN, CLERK

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No. 15531
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

G. ABRAMSON and HOWARD MILLER,

Appellants,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate
of Feldman-Selje Corporation, Bankrupt,

Appellee.

Reply Brief of George Gardner as Trustee in Bankruptcy of the Estate of Feldman-Selje Corporation, Bankrupt, Appellee.

Jurisdiction.

Appellee accepts as correctly stated the "Basis of Jurisdiction" as is set forth in Appellants' Opening Brief.

Statement of the Case.

Appellee accepts appellants' "Statement of the Case" as substantially correct, but as modified as follows:

Appellee does not concede that appellant Abramson's bid of \$500.00 was the "best bid", but only concedes that it was the highest bid made at the purported sale.

The validity of the judgment and the purported sale in the State Court is a question to be decided on this appeal.

Appellee admits that as Receiver he sold the personal property involved in this proceeding at a public auction, at which public auction he received the sum of \$6,817.61 for said personal property, and that he is holding said sum of \$6,817.61 pending the disposition of this appeal, and that said sum of \$6,817.61 is the “proceeds” from the sale of the personal property involved which appellants hope to receive by a reversal of the Order of the Referee and the affirmance of said Order by the District Court. (The fact that the Receiver had received \$6,817.61 by the sale of said personal property was a fact that was known to the District Judge at the time of the hearing on the Petition for Review, because that fact was contained in a letter which was an exhibit attached to the Trustee’s Brief of the facts and the Points and Authorities submitted to the District Court for its consideration, but that fact does not appear in the record of any of the papers before this Court on appeal, for which reason the foregoing explanation is being made of the reference to said sum of \$6,817.61.)

The Questions Involved on Appeal.

In the opinion of appellee the questions involved in this appeal are as follows:

1. Is the purported sale to appellant Abramson “null and void” under Section 67a(1a) of the Bankruptcy Act because the purported judgment lien was obtained at a time when the judgment debtor was admittedly insolvent and as a consequence no valid sale could be held under a void judgment?

2. Assuming, but not admitting, that the purported sale was a valid sale, was appellant Abramson a “bonafide purchaser” within the exception to Section 67, Subdivision 3 of The Bankruptcy Act?

3. Is not the appellant Miller in exactly the same legal position as appellant Abramson?

4. Can there be a valid "sale" of personal property capable of physical delivery without the alleged purchaser taking immediate delivery and exercising continued dominion of ownership over said personal property?

Before presenting any law or argument sustaining Appellees' belief of the questions involved in this appeal, as hereinabove set forth, let us first attempt to dispose of each of the questions which the Appellants in their Opening Brief believe to be the points involved and which are to be decided and which points are as follows and are found on page 5 of Appellants' Opening Brief:

a. The first question is: "Did the Appellant Abramson acquire valid title and right to the possession of the personalty at the execution sale referred to? (It is conceded that the Appellant Miller stands in the same position as the Appellant Abramson insofar as title and the right to possession are concerned.)

The answer to the foregoing question in the opinion of counsel for the Appellee is a definite "no", because Section 67 of The Bankruptcy Act, subdivision a(1) reads as follows:

"LIENS AND FRAUDULENT TRANSFERS.

"a. (1) *Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent, etc.*" (The italics does not appear in the text but is used by counsel for emphasis.)

On August 24, 1956, the action resulting in the execution sale was filed and on the same day a writ of attachment was issued. On September 2, 1956, a judgment was obtained by default and on September 12, 1956, a writ of execution was issued, and the sale was thereafter had, and on October 1, 1956, the involuntary petition herein was filed, and on October 12, 1956, an adjudication was entered. From the foregoing sequence of events it would appear that approximately a month and three weeks passed before the date of the filing of the suit, the date of the attachment lien and the subsequent judgment being obtained, all well within the four months provided for by Section 67(a) (1) of the Bankruptcy Act.

As to whether or not the judgment debtor, the bankrupt herein, was insolvent, reference is made to the testimony of Stanley J. Fishman, the attorney for the attaching creditor, appearing at pages 39 and 40 of the Supplemental Transcript of Record reading as follows:

“Q. Were you aware of the fact that the Bankrupt corporation had been negotiating with its creditors to try to get a settlement of the situation with them?

A. With his creditors?

Q. Yes. A. I was very much aware of it.

Q. You were very much aware of it. You knew the financial condition of the Bankrupt, did you not?

A. Yes.

Q. *As a matter of fact, you knew that it was insolvent, didn't you?* A. Yes. Your Honor, I believe I can shorten these proceedings with Mr. Gardner's permission.

The Referee: Go ahead.

The Witness: Out of the \$500 that Mr. Miller paid for the assets I bought for \$500 as a credit and sold for \$500 in cash in turn, I agree to turn that \$500 over to whomsoever the Court directs, reserving any right I may have to file a petition, *that the attachment was made for the benefit of all creditors*, and I should be allowed my costs. But I have the \$500 and I will agree to return it.

Q. (By Mr. Gardner): As I understand your testimony, you do not now assert that you claimed any adverse interest to other creditors when you bought this. You were doing it for the benefit of all creditors? A. Not at this point. At this time my testimony is that I will turn the \$500 over to whomsoever the Court directs without contesting any preference action, to save you the trouble of bringing a preference action. That is all my testimony is for.

Q. *You were aware of the insolvent condition of the Bankrupt, weren't you?* A. *Yes.*

Q. *At the time you bought this in?* A. *Yes.*

Q. Howard Miller bought from you, didn't he? A. Yes.

Mr. Gardner: You may cross-examine." (The italics does not appear in the text but is used by counsel for emphasis.)

On page 19 of Appellants' Opening Brief counsel for the Appellants admits

"That the purchasing creditor (the appellant Abramson) had knowledge of the insolvent condition of the bankrupt concern at the time the execution sale was made. *This fact is not denied* and was readily admitted at the hearing held on the Receiver's position." (The italics does not appear in the text but is used by counsel for emphasis.)

In the Findings of Fact prepared in this matter and found on page 23 of the Transcript of the Record, the Court among other things found as follows:

“That at the time the Respondent G. Abramson caused the Attachment to be levied, and at all times thereafter, *the bankrupt was wholly insolvent*, and that the said Respondent G. Abramson *not only had reasonable cause to believe, but had actual knowledge of said fact*; and that the said Respondent G. Abramson knew when she attempted to purchase the said property at said execution sale by giving a credit of \$500.00 on her judgment, that she was obtaining a preference over other creditors of the same class, and knew that in the event of bankruptcy within four months of such attempted preferential purchase, she would be required to surrender the said preference; *and that therefore, she was not a bona fide purchaser at said judicial sale*, but was attempting to obtain a preference over other creditors of the same class.

“That the purported sale by the Respondent G. Abramson to the Respondent Howard Miller, *was a private sale and not a judicial sale*; and that the \$500.00 paid by Respondent Howard Miller was not the fair equivalent value of said property; and that the title obtained by said Howard Miller is valid only to the extent of the \$500.00 which he paid; and that upon the return to him of said \$500.00, he has no further right, title or interest in or to any of the property in controversy.” (The italics does not appear in the text but is used by counsel for emphasis.)

It would seem that from all of the above, the Appellants' question number 1, which is referred to as question a herein, has been fully answered, and that the only answer to that question is “no” for all of the reasons

and by reason of all of the testimony and the facts as hereinabove set forth.

b. The second question is:

“Having secured title at an execution sale can the Appellants’ title be invalidated by a subsequently appointed Receiver or Trustee in bankruptcy under Section 67 of The Bankruptcy Act when the petition in bankruptcy was filed several weeks *after* such sale?”

The answer to the foregoing question, in the opinion of the Appellee, is “yes” for each of the same reasons as set forth above in the answer to question 1 (herein referred to as question a) and also because it is apparent from the answer to question a above that the Appellant Abramson did not acquire any valid title.

c. The third question is: “Isn’t the subsequently appointed Trustee in Bankruptcy limited to the recovery of a preference under Section 60 of The Bankruptcy Act?”

The answer to this question might have been “yes” if the personal property which is the subject matter of the litigation and of this appeal had been moved from the possession of the bankrupt and placed beyond the reach of the summary process of the Bankruptcy Court, but the fact is that the personal property was never moved from the possession and the premises of the bankrupt and at all times was in the possession of the bankrupt and was found there by the Receiver.

On page 22 of the Transcript of Record the Referee who heard this matter made the following Finding of Fact with reference to the foregoing:

“That the property in controversy was never removed from the premises of the bankrupt, and that

on or about October 1st, 1956, an Involuntary Petition in Bankruptcy was filed against the bankrupt and said bankrupt was adjudicated on or about October 10th, 1956, and when the Receiver took possession of the premises of the said bankrupt, *the property in controversy was still there, and the Receiver took possession thereof, and is now in possession.*" (The italics does not appear in the text but is used by counsel for emphasis.)

For all of the foregoing reasons it is the opinion of counsel for the Appellee that the answer to the foregoing question number 3 (herein referred to as c) is no.

d. The fourth question is:

"Conceding that the purchaser at the execution sale is also the judgment creditor, should such judgment creditor occupy a different status than any other bidder or purchaser?"

The answer to the foregoing question must be "yes", not only because of the judgment creditor's knowledge of insolvency as hereinabove already noted in answer to question number 1 (herein referred to as a above), but also because plaintiff in fact was not the real party in interest and was not the real judgment creditor, but a secretary in the office of attorney Fishman, as appears from the foregoing questions and answers at pages 36 and 37 of the Supplemental Transcript of Record as follows:

"Q. Mr. Fishman, you are attorney for G. Abramson? A. That is correct.

Q. Who is G. Abramson? Is he someone in your office? A. That is correct. She is the secretary in the office."

Therefore, the knowledge of attorney Fishman was in fact the knowledge of his secretary, G. Abramson, the plaintiff in the law suit, and attorney Fishman knew of the defendant's insolvency as is amply evident from the admissions of counsel for the Appellants (App. Op. Br. p. 19) and as is amply evident from Fishman's testimony at pages 39 and 40 of the Supplemental Transcript of Record, which is hereinabove quoted in full in answer to question number 1 (referred to herein as a) and is also evident from the Findings of Fact hereinabove referred to and found on page 23 of the Transcript of Record.

e. The fifth question is: "Are the Appellants entitled to the fund in possession of the Appellee or is the bankrupt estate the owner?"

If the answers to the first four questions as hereinabove set forth to Appellants' first four questions are correct in the light of the facts in this case and the law as applied to those facts, then the answer is that the Trustee in Bankruptcy of the bankrupt estate is entitled to the funds in controversy and not the appellants.

Having disposed of each of the Appellants' questions in the manner hereinabove set forth, let us now proceed to inform the Court on the questions which the Appellee believes are involved in this appeal and which questions stated in sequence are as follows:

POINT I.

Is the Purported Sale to Appellant Abramson “Null and Void” Under Section 67a(1) of the Bankruptcy Act Because the Purported Judgment Lien Was Obtained at a Time When the Judgment Debtor Was Admittedly Insolvent and as a Consequence No Valid Sale Could Be Held Under a Void Judgment?

It would seem that the reading of Section 67a (1) of the Bankruptcy Act answers the question in the affirmative, and the Court must conclude that the purported sale was “null and void” because all of the facts clearly fit in to said Section 67a (1) as follows: First we have an attachment lien followed by a judgment lien. Both liens were obtained within the four months prior to the filing of the petition. It is apparent that both the attachment lien and the judgment lien were obtained while the defendant in the State Court action, the bankrupt herein, was insolvent. This is all amply apparent and abundant from the factual statement of the case by counsel for the Appellants by the testimony of the witness Fishman, by the admissions by counsel for the Appellants and from the Findings of Fact in this matter, all of which have been hereinabove amply referred to and pinpointed as to their location in the Transcript of Record, the Supplemental Transcript of Record and the Appellants’ Opening Brief.

It is not deemed necessary to burden the Court with cases on the point when the factual situation fits in so fully, clearly and definitely with the section entitled “Liens And Fraudulent Transfers” referred to herein as Section 67a (1) of The Bankruptcy Act, which Section itself uses the words “null and void” if the factual situation comes within the prohibitions of said Section.

POINT II.

Assuming, but Not Admitting That the Purported Sale Was a Valid Sale, Was Appellant a “Bona Fide Purchaser” Within the Exception to Section 67, Subdivision 3 of the Bankruptcy Act?

The answer to the foregoing question is in the negative because of the knowledge of insolvency on the part of Abramson as admitted by the attorney for the appellants and as also admitted by the attorney for G. Abramson in his testimony quoted hereinabove.

Further, because the original attachment, as appears from the testimony of attorney Fishman for the plaintiff and which is found at page 39 of the Supplemental Transcript of Record, was to the effect “that the attachment was made for the benefit of all creditors.”

Further, by reason of the fact that the Court found after hearing the testimony and as set forth on page 23 of the Transcript of Record, “that therefore, she was not a bona fide purchaser at said judicial sale, but was attempting to obtain a preference over other creditors of the same class.”

Further, because of the fact that the Court found [page 21 of the Transcript of Record]

“That the property involved in this controversy is of the value of \$1,700.00, as found by the Court Appraiser; and that the sum of \$500.00 is not a fair consideration for the property involved in this controversy.”

In addition to the foregoing, the following Points and Authorities are submitted for this Court’s consideration in determining whether or not the Appellants are “bona fide purchasers at a judicial sale.”

In Black's Law Dictionary, Third Edition, page 234, a bona fide purchaser is described as follows:

"A purchaser for a valuable consideration paid or parted with in the belief that the vendor had a right to sell, and without any suspicious circumstances to put him on inquiry."

Merritt v. Railroad Co., 12 Barb (N. Y) 605.

"One who acts without covin, fraud, or collusion; one who, in the commission or connivance that no fraud, pays full price for the property, and in good faith, honestly, and in fair dealing *buys and goes into possession.*" (The italics above does not appear in the text of the opinion but is used by counsel for emphasis.)

Sanders v. McAfee, 42 Ga. 250.

"A bonafide purchaser is one who buys property of another without notice that some third person has a right to, or interest in, such property, *and pays a full and fair price for the same* at the time of such purchase, or before he has notice of the claim or interest of such other in the property." (The italics above does not appear in the text of the opinion but is used by counsel for emphasis.)

Spicer v. Waters, 65 Barb. (N. Y.) 231 and many other cases.

There are a number of cases cited in 11 U. S. C. A. at page 472, Note 257, which are cases cited under Sec-

tion 67a (3) of "The Bankruptcy Act", and some of the cases are as follows:

"A purchaser is not in good faith who makes no effort to determine whether one may make a transfer which will not be in violation of this section." (The section referred to above being Section 67a (3).)

Lumpkin v. Foley, 204 Fed. 372.

"A person is not to be considered a bonafide purchaser, who, in addition to knowledge of suspicious circumstances, is aware that he is purchasing a large and valuable amount of property at a grossly inadequate consideration."

In re Goldberg, 121 Fed. 578.

"Surrounding circumstances, leading an ordinarily prudent businessman to conclude that execution debtor is insolvent, will deprive purchaser at execution sale of status of bonafide purchaser."

Dreyer v. Klicklighter, 228 Fed. 774.

It would appear from all of the foregoing that the answer to question number 2 raised by the Appellee must be a negative answer and that the Appellate Abramson was not a bona fide purchaser" within the exception to Section 67, subdivision 3 of The Bankruptcy Act.

POINT III.

Is Not the Appellant Miller in Exactly the Same Legal Position as Appellant Abramson?

It would appear that the answer to the foregoing question is not difficult, and in fact it is admitted by the counsel for the Appellants on page 5 of Appellants' Opening Brief.

“That the Appellant Miller stands in the same position as the Appellant Abramson insofar as title and right to possession are concerned.”

If the foregoing were not sufficient to settle this question counsel for the Appellee is certain that the following citation of law would dispose of the position of the Appellant Miller.

“The seller of property can transfer to the buyer no better title than he has himself, and if at the time of the transfer he had no title, the purchaser, although buying in good faith and for full value, obtains no title.”

Pop v. Exchange Bank, 189 Cal. p. 296.

And to the same effect the case of *Siebenhauer v. Bank of California*, 211 Cal. at page 239.

It would therefore follow that if the sale is void for all of the reasons hereinabove indicated as against the Appellant Abramson, that it is equally void as to the Appellant Miller, because he is in exactly the same legal situation as is the Appellant Abramson.

POINT IV.

Can There Be a "Valid Sale" of Personal Property Capable of Physical Delivery Without the Alleged Purchaser Taking Delivery and Exercising Dominion of Ownership Over Said Personal Property?

The answer to this question must be in the negative. That the personal property alleged to have been purchased was never moved out of the premises of the bankrupt and was found there by the Receiver at the time of his appointment cannot be disputed, as such is the finding of the Referee, affirmed by the District Court, as is hereinabove amply set forth and referred to.

Section 3440 of the Civil Code of the State of California provides that

"Every transfer of personal property made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery followed by an actual and continued change of possession of the thing transferred, is conclusively presumed fraudulent and void as against the transferor's creditors while he remains in possession, etc., etc." (The italics does not appear in the text but is used by counsel for emphasis.)

There are many cases on the subject, and while it is not intended to burden the Court with too many of them, it is well to point out some of the following:

"Good faith and adequate consideration for transfer of personalty are immaterial and constitute no defense to action to set aside transfer for fraud on transferor's creditor, in absence of change in possession of personalty."

Hepner v. Hepner, 32 Cal. App. 2d 582.

“A transfer of personal property, unaccompanied by a corresponding change of possession, is fraudulent per se, and void as to creditors.”

Chenery v. Palmer, 6 Cal. 119, and many other decisions cited in this case to the same effect.

“Transfer of title by buyer to bank paying price without delivery and change of possession, is void as against buyer’s creditors, if title passed from sellers to buyer.”

Mohr v. First National Bank, 69 Cal. App. 756.

“Recordation of bill of sale of personal property without immediate delivery was no defense as against execution creditor.”

Edgerton v. Scammon, 119 Cal. App. 273.

“Where there was no delivery or change of possession of grain conveyed by a bill of sale, the right of an officer who attached it under a writ in an action against the vendor was superior to that of the purchaser.”

Crocker v. Cunningham, 122 Cal. 547.

“The fact that the purchaser of personal property at sheriff’s sale permits it to remain in the possession of the judgment debtor after the sale, and allows him to exercise acts of ownership over it, is some evidence that the sale was fraudulent as to the creditors of the judgment debtor.”

O’Brien v. Chamberlain, 50 Cal. 285.

Argument and Conclusion.

It follows from the statement of facts and the law applicable to the facts that the Appellants in this matter do not come within the exception of Section 67a (3) of "The Bankruptcy Act" and that they are not "bona fide purchasers at a judicial sale", and that the purported lien of the judgment under which the purported sale took place was a judgment lien that was "null and void" under Section 67a, (1) of The Bankruptcy Act, because at the time when the judgment lien was obtained the judgment debtor was insolvent and was admittedly known to be insolvent and was found to be insolvent in the Findings of Fact resulting from the trial of the action before the Referee, and that the purported execution sale was null and void and conclusively presumed to be fraudulent by reason of the violation of Section 3440 of the Civil Code of the State of California in that the sale of the personal property was not accompanied by an immediate delivery and by an actual and continued change of possession of the things transferred, for all of which reasons it is respectfully urged that the judgment of the Referee and judgment of the District Court be affirmed.

Respectfully submitted,

SAMUEL A. MILLER,

Attorney for Trustee, Appellee.

IN THE

FOR THE NINTH CIRCUIT

Appellants,

U.S.

Appellee.

APPELLANTS' REPLY BRIEF.

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No. 15531

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. ABRAMSON and HOWARD MILLER,

Appellants,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate of
Feldman-Seljé Corporation, Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

Because the jurisdictional basis, the statement of the case, and the questions involved on appeal have been fairly well settled by the opening and reply briefs, no further attention will be directed to these matters in this closing brief.

The appellants, however, do desire to make comment upon the reply brief filed herein and will do so under the points as numbered in the reply brief.

POINT I.

Since no cases are cited by the appellees under Point I, it is submitted that appellees have utterly failed to come to grips with the points raised as well as the authorities cited in the opening brief.

Evidently appellees are still under the impression that a judgment lien arose at the execution sale rather than

the transfer of title. No cases are cited in support of this view and it is submitted that such might be the case were an Abstract of Judgment recorded against *real* property but is surely not the case in view of the authorities cited in the previous memorandum.

POINT II.

To begin with it is true that the court found the value of the property to be in the sum of \$1,700.00 as is set forth in Appellee's brief. The fact that only \$500.00 was paid for the property involved does not render the consideration unfair. Mere inadequacy of the price paid for goods at execution sale, however, gross, is insufficient to render said sale invalid. There must be proof of either fraud, oppression or other unfairness in order to set said sale aside. (See *Bock v. Losekamp*, 179 Cal. 674, 179 Pac. 516 (1919), and *Rauer v. Hertwick*, 175 Cal. 278, 165 Pac. 946 (1917).)

The language of the Supreme Court in the case of *Jones v. Springer* cited in the opening brief, indicates that ordinarily the sales price of the goods is presumed to be the fair value at an execution sale.

Counsel goes on thereafter to cite various cases defining the rights of a bona fide purchaser, none of which were decided under the applicable provisions of Section 67 of the Bankruptcy Act. There is one notable exception and that is the case of *Dreyer v. Klicklighter* (erroneously cited as *Dreyer v. Klicklighter*). This case was, indeed, decided under Section 67 of the Bankruptcy Act.

Counsel has failed to note, however, that this case was decided under the *old Section 67(f)* of the Bankruptcy Act, the full text of which section is included in the body of the opinion. Sufficient to say that the Bankruptcy Act

has since been amended and that the new Section 67, which is under consideration here has eliminated the very language which was the subject matter of that decision.

If anything, the two sections, when placed side by side, indicate that law has progressed to the point where more and more protection has been given to purchasers at execution sale.

It should also be noted that the case of *Dreyer v. Kicklighter* has been overruled by implication in the Georgia courts in the case of *In re Moore*, 42 F. 2d 475, 16 A. B. R. (N. S.) 174 (D. C. Ga., 1930).

POINT III.

There is no comment on Point III, although it should be emphasized that personal property once sold at execution does find itself in the hands of subsequent purchasers and holders for value and thereafter may find itself in regular commercial channels in course of trade.

While the transferee of the purchaser may be in the same legal position as the purchaser at the sale strong policy reasons suggest themselves for conferring upon the purchaser good and valid title which may not be subsequently defeated by a petition in bankruptcy. These reasons are adequately covered in the opening brief.

POINT IV.

To the knowledge of appellees the question of the application of Section 3440 of the Civil Code of the State of California, has never been previously raised in these proceedings.

I do not think it is seriously contended that Section 3440 of the Civil Code was meant to apply or did apply to execution sales.

The statute itself contains a provision excluding its operation from judgment sales.

Section 3440.1(b)(a) provides as follows:

“Any sale, transfer, or assignment of a stock in trade or to any sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant, made under the direction or order of a court of competent jurisdiction or by any executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law.”

Respectfully submitted,

WILLIAM J. TIERNAN,

Attorney for Appellants.

No. 15531

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. ABRAMSON and HOWARD MILLER,

Appellants,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate
of Feldman-Seljé Corporation, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

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PAUL F. O'BRIEN, Clerk



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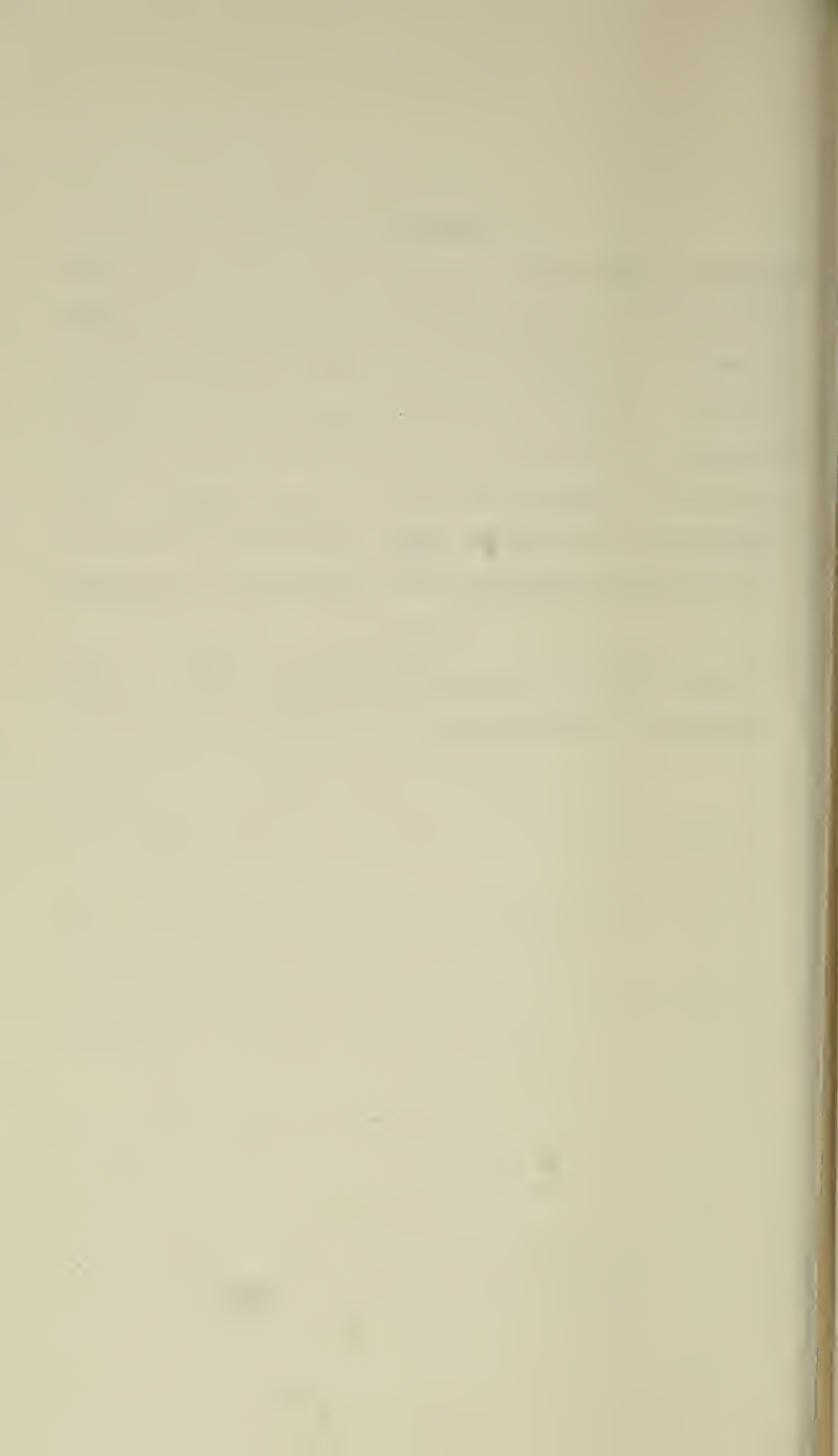
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No. 15531
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

G. ABRAMSON and HOWARD MILLER,

Appellants,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate
of Feldman-Selje Corporation, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

Basis of Jurisdiction.

This was an original proceeding begun in the District Court by the filing of a Petition in Involuntary Bankruptcy on October 1, 1956 [Tr. pp. 3-6]. Thereupon an Order of General Reference was made to Referee Howard V. Calverly [Tr. pp. 6-7]. Referee Calverly made and entered an adjudication of Bankruptcy [Tr. p. 7].

Thereupon the Referee appointed a Receiver, to wit, the Appellee, George Gardner [Tr. pp. 8-9]. The Receiver in turn filed his Petition for an Order to Show Cause *re* Setting Aside of Sale, and the Referee in Bankruptcy issued an Order to Show Cause based upon this petition [Tr. pp. 9-15].

Statement of the Case.

The facts in this matter are undisputed and may be summarized chronologically as follows:

On August 24, 1956, an action at law was filed in the Superior Court of Los Angeles County by the appellant Abramson against the Feldman-Seljé Corporation. On the same day a Writ of Attachment was issued by the Clerk of that Court and certain personal property consisting of unfinished desks belonging to the corporation was attached by the Marshal of Los Angeles County.

On September 2, 1956, a judgment of approximately \$4,000.00 was secured by the appellant Abramson against the Corporation in the Superior Court action referred to.

On September 12, 1956, a Writ of Execution was duly issued by the Clerk of the Superior Court and pursuant to the instructions of the appellant Abramson a Marshal of Los Angeles County conducted a sale of the personal property previously attached for the satisfaction of the judgment secured by the appellant Abramson. The sale was legally conducted in the presence of other bidders and the property was sold to the appellant Abramson for the sum of \$500.00 which was the highest and best bid.

There is no question concerning the validity of the sale or the proceedings in the Superior Court which preceded it. This appeal is not concerned with the proceedings in the State Court.

Thereupon the appellant Abramson resold the property to the appellant Miller for the sum of \$500.00 in cash

for which he issued to the appellant Miller a Bill of Sale which was recorded in Los Angeles County and which was introduced in evidence and is part of the record of this appeal.

Thereafter on October 1, 1956, three creditors of the corporation filed their Petition in Involuntary Bankruptcy. On October 10, 1956, the Referee in Bankruptcy adjudicated the corporation a bankrupt and on October 12, 1956, George Gardner was appointed Receiver of the bankrupt concern. The Receiver promptly took possession of the premises of the bankrupt and found that the personal property of unfinished desks and other inventory was still located upon the premises of the bankrupt.

Thereupon the Receiver filed his Petition for an Order to Set Aside the Sale as to both appellants Abramson and Miller under the provisions of Section 67 of the Bankruptcy Act. The appellants-respondents filed a Motion to Dismiss the Petition, which was denied by the Referee. A hearing was held on the allegations contained in the Receiver's petition and the Referee made his Findings of Fact, Conclusions of Law and Order in which the Execution Sale to Abramson was invalidated and set aside. The subsequent resale to Miller was also invalidated. The Court also ruled that the \$500.00 paid to Abramson by Miller should be refunded to the appellant, Miller. A Petition to Review the Referee's Order was immediately filed which was affirmed by the District Judge.

In the interim the Receiver sold the personal property at public auction and the Receiver now holds the pro-

ceeds from the sale pending the disposition of this appeal as to their ownership.

The appellant Abramson has at all times offered to return the sum of \$500.00 to the bankrupt estate or to whomever directed by the court.

The questions involved in this appeal are as follows:

1. Did the appellant Abramson acquire valid title and right to the possession of the personalty at the Execution Sale referred to? (It is conceded that the appellant Miller stands in the same position as the appellant Abramson insofar as title and the right to possession are concerned.)

2. Having secured title at an Execution Sale can the appellants' title be invalidated by a subsequently appointed Receiver or Trustee in Bankruptcy under Section 67 of the Bankruptcy Act where the Petition in Bankruptcy was filed several weeks *after* such sale occurred?

3. Isn't the subsequently-appointed Trustee in Bankruptcy limited to the recovery of a preference under Section 60 of the Bankruptcy Act?

4. Conceding that the purchaser at the Execution Sale is also the judgment creditor, should such judgment creditor occupy a different status than any other bidder or purchaser?

5. Are the appellants entitled to the fund in possession of appellee or is the bankrupt estate the owner?

Specification of Errors.

1. The Referee in Bankruptcy should have granted the appellants' Motion to Dismiss the Petition of the Receiver [Tr. p. 25].

2. The Referee should have made his Findings of Fact, Conclusions of Law in accordance with the evidence introduced at the hearing and entered judgment accordingly in favor of the appellants-respondents. The Findings of Fact and Conclusions of Law in this matter are not numbered; however, they are found on pages 20 through 26 of the Transcript of Record and the errors in said Findings and Conclusions of which these appellants complain are as follows:

A. That an attachment lien *only* existed in favor of the appellants at the time of the filing of the Petition in Bankruptcy [Tr. p. 22].

B. That the Receiver took possession of the personal property and was in possession and had the right to the possession of the personal property [Tr. pp. 22, 23 and 24].

C. That the appellants-respondents Abramson and Miller are not and were not bona fide purchasers at the judicial sale [Tr. pp. 23-24].

D. That neither of the appellants-respondents had title to the personal property [Tr. pp. 23-24].

E. That the personal property referred to belonged to the bankrupt estate free and clear of any lien or claim of the appellants-respondents.

3. The District Judge erred when he affirmed the Findings of Fact, Conclusions of Law and the Order of the Referee in Bankruptcy [Tr. p. 29].

POINT ONE.

A Purchaser at Execution Sale Gets Valid Title and the Right to Possession.

It is conceded that the proceedings under which Abramson secured title at the Execution Sale were valid and legal. It is also conceded that these proceedings occurred several weeks prior to the time that the Involuntary Petition in Bankruptcy was filed.

There is no general substantive body of law pertaining to property or property rights independent of the law of the state which confers these property rights. The rule is that the Bankruptcy Court follows all state court rulings with respect to the determination of property rights. This has been decided in this circuit in the case of *Laugharn v. The Bank of America N. T. & S. A.* (C. C. A. 9, 1937), 88 F. 2d 551, 33 A. B. R. (N. S.) 656:

“If previous decisions of this court, in the absence of state court decisions, established a rule of property, which was later changed by state statute, can it be argued that this court must follow its previous decisions? If the law of the state is established either by statute or judicial decisions, this court must follow the law of property as determined by the highest state court. Therefore, we must and do overrule the prior decisions of this court in so far as they are inconsistent with the settled law of California as adjudged by the California courts.”

At an execution sale of personal property the purchaser thereof gets valid title from the officer making the sale.

Section 699 of the Code of Civil Procedure provides:

“Personal property not capable of manual delivery, how sold and delivered. When the purchaser of any

personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied."

The rules of law established by the California Courts as to the passage of title and the right to possession are contained in the case of *Holm v. Overholt* (1932), 214 Cal. 431, 6 P. 2d 76. In this case the Court said:

"Where an attachment is levied on personal property capable of manual delivery, it is the duty of the sheriff to attach and safely keep sufficient of such personal property as will satisfy the plaintiff's demand against the defendant unless a satisfactory redelivery bond or cash be deposited with him (Secs. 540, 542, Code Civ. Proc.) or the attachment is otherwise released. It is his duty to maintain the possession of the property for the benefit of the attaching plaintiff and he may not dispose of it except at his peril and only in accordance with law. (*Callahan v. Danziger*, 172 Cal. 738 [158 Pac. 760]; *Aigeltinger v. Whelan*, 133 Cal. 110 [65 Pac. 125]; *Wood v. Lowden*, 117 Cal. 232 [49 Pac. 132]; 6 C. J. p. 370, Sec. 819.) Upon the Execution Sale of personal property capable of manual delivery the purchaser is entitled to possession upon payment of the purchase price and to a certificate of sale transferring to him all of the debtor's interest in the property as of the date of the levy of the execution. (Sec. 698, CCP; 11 Cal. Jur. pp. 83, 139.)"

It is significant to a determination of the issues in this case to understand at this point the rule in California as to judgments and liens of judgments preceded by at-

tachments. Under California law an attachment on personal property creates a lien. The lien is satisfied and extinguished when there is an execution sale. This is of primary significance in the determination of this case because the entire case of the Trustee in Bankruptcy is based upon the erroneous assumption that at the time of the filing of the bankruptcy petition in October the appellants had only a lien upon the property. It is the position of the appellants that the lien had been extinguished by the execution sale and the appellants had title and the right to possession.

In California, a sale at execution extinguishes the lien and converts the purchaser's rights into the right to title and the right to possession. In the case of *Bateman v. Kellogg* (1922), 59 Cal. App. 464, 211 Pac. 46, the court set forth at page 473:

"By the sheriff's sale to appellant on May 3, 1915, his judgment against L. A. Walker was satisfied, and his judgment lien thereupon ceased to exist. When property is sold under execution for the full amount of the judgment, the lien created by the levy is thereby extinguished."

The California courts themselves have recognized the importance that must attach to the finality of judicial sales. In the case of *Pepin v. Strickland* (1931), 114 Cal. App. 32, 299 Pac. 577, the court said:

"The judgment creditor purchasing at an execution sale in reliance upon the appearance of title in the judgment debtor is a bona fide purchaser and not bound by any secret interest of which he is not put upon notice, actual or constructive."

The same rule was followed in California in the case of *Pacific Fruit Exchange v. Schropfer* (1929), 99 Cal. App. 692, 279 Pac. 170.

The foregoing authorities, it is believed, conclusively establish the rights of a purchaser at execution sale as well as the fact that the Bankruptcy Court in the administration of its estates is bound by these rulings in a determination of a question of property rights in its forum.

POINT TWO.

The Execution Sale Having Been Completed Several Weeks Prior to Bankruptcy, There Was No Lien for the Bankruptcy Court to Set Aside Under Section 67 of the Bankruptcy Act but Only the Right to Recover a Preference Pursuant to Section 60 of the Bankruptcy Act.

It is not denied that the Involuntary Bankruptcy Petition was filed on the first day of October, 1956 or approximately two weeks *after* the sale at execution to the appellants had taken place. After the appointment of George Gardner as Receiver, he instituted a proceeding by Petition for an Order to Show Cause *Re* Setting Aside of Sale [Tr. pp. 9-15]. The petition (which is not numbered) provides *inter alia* as follows:

“ . . . that if allowed to stand, the said execution sale would be preferential so far as the said G. ABRAMSON is concerned; that the lien obtained by the attachment and execution was a lien obtained by legal proceedings, within four months of bankruptcy, upon property of the bankrupt, and at a time when the bankrupt was insolvent, and would have been void as against the Trustee in Bankruptcy to be appointed herein, had not the purported sale taken place.”

The difficulty with the position of Trustee in Bankruptcy throughout these proceedings is that he has mistaken his remedies. The Trustee has continually insisted that his remedy lies under Section 67 of the Bankruptcy Act (11 U. S. C. A. 107) rather than under Section 60 of the Bankruptcy Act (11 U. S. C. A. 96). Section 67a(1) of the Bankruptcy Act provides as follows:

“LIENS AND FRAUDULENT TRANSFERS. a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act: Provided, however, That if such person is not finally adjudged a bankrupt in any proceeding under this Act and if no arrangement or plan is proposed and confirmed such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.”

On the other hand Section 60 of the Bankruptcy Act, which is devoted to preferences rather than the elimination of certain judicial liens provides as follows:

“60. PREFERRED CREDITORS. a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a great percentage of his debt than some other creditor of the same class.”

From a reading of the cases under both sections, it is apparent that Section 67 is designed to eliminate certain liens acquired by judicial proceedings, as an attachment, while Section 60 is designed to recover for the Bankrupt estate payments made to creditors in certain situations and under certain circumstances which can be regarded as preferential.

Irrespective of what theory the Trustee is proceeding upon, it is the contention of the appellants that the acquisition of this property at a judicial sale before bankruptcy conferred absolute title upon the purchaser which was not defeasible by a subsequently-appointed officer of the Bankruptcy Court where the bankruptcy petition was not filed until after the sale had occurred. The Receiver is entitled only to the \$500 paid upon the judgment.

If the matter were regarded as a lien transaction, the Trustee's position is fallacious because at the time of the sale the lien expires and the purchaser receives title and the right to possession. If the transaction is regarded as a preference, the Trustee is limited to the recovery of the moneys paid to the judgment creditor which he received, by virtue of the sale and which he has at all stages of the proceedings offered to return to the estate voluntarily.

In Collier's Treatise on Bankruptcy (14th Ed.) Vol. 4, page 147, it is said:

“Where the lien of a judicial proceeding is enforced by the sale of the debtors property subject thereto and the proceeds paid over to the lien creditor prior to the debtor's bankruptcy, the lien becomes merged in the payment and accordingly cannot be affected by

Section 67, notwithstanding the occurrence of bankruptcy within four months of the acquisition of the lien.”

In Remington on Bankruptcy (5th Ed.), Vol. 4, page 391, the same position is taken; that is to say where there has been a sale under execution *before* intervention of a bankruptcy petition, Section 67 no longer applies. The Bankruptcy trustee under these circumstances is limited to the recovery of the proceeds of the sale while in the possession of the sheriff or by recovery from the attaching creditor if the sheriff has already paid the funds over to him.

A case which is on all four's with the case at bar is the case of *In re Bailey* (D. C. Ore., 1906), 144 Fed. 214, 16 A. B. R. 289, where the court said:

“The case at bar, however, presents a different condition from either of the foregoing, by reason of the fact that the purchaser, who is the judgment creditor, has come into the property by virtue of the sheriff's sale, which had been consummated prior to the filing of the petition in bankruptcy, and everything had been done that was required by law to be done for a transfer of the debtor's property to the purchaser, through the process of the court, so that at the time of the filing of the petition in bankruptcy, the debtor was not the owner of the property and, not being the owner, a fortiori, he was not the owner of the proceeds thereof. Keeping in mind now, that it is the lien that is declared void by virtue of section 67f, and not the transfer, one can readily understand that the section does not affect the transaction vitally, or render it void. This has been decided by the case of *Levore v. Seiter, et al.*, 5 A.B.R. 576, 69 N. Y. Supp. 987); it being there held that, where a

judgment has been had and levy made within four months of the filing of the petition in bankruptcy, and the property sold, and the money, the proceeds of the sale, turned in to the hands of the judgment creditor, the lien of the judgment and levy were wholly void, and the creditor could be compelled to return the money in a plenary suit instituted by the trustee for that purpose. But this case was reversed on appeal to the Appellate Division of the Supreme Court of the State (see *Levor v. Seiter, et al.*, supra), where it is held that, the money having been paid over to the judgment creditor before the filing of the petition in bankruptcy, the case does not fall within the provisions of Section 67f of the Bankruptcy Act, and that the lien created by the judgment and levy is not rendered void by the adjudication. It was further held, in that case, that the remedy, if any the trustee had, was by action against the creditor for having received a preference under the provisions of sections 60a and 60b (30 Stat. 564 [U. C. Comp. St. 1901, p. 3445]); . . .”

The same rule was followed in the following cases:

In re Resneck (D. C. Pa., 1909), 167 Fed. 574, 21 A. B. R. 740;

In re Knickerbocker (D. C. N. Y., 1903), 121 Fed. 1004, 10 A. B. R. 381;

Stone-Ordean Wells Co. v. Marl (C. C. A. 8), 227 Fed. 975, 35 A. B. R. 663.

Consider the position of one who attends and bids at a judicial sale under the rule which is espoused by the trustee in bankruptcy. Such a purchaser who purchases before bankruptcy must hold the property purchased for the full four-month period before he may resell, retrans-

fer or in any other way dispose of it because within the ensuing four months a bankruptcy *might* be filed and his title invalidated.

Consider, also, the atmosphere under which judicial sales are to be conducted. Should it be known at judicial sales that the purchaser of any and all property must hold the same four months and that such a sale is not final for four months, the purchase price of large bulky items of personal property will decline tremendously, bidders will be afraid or reluctant to bid and the courts will of necessity have to abandon judicial sales or the levying creditors will have to post storage fees for four ensuing months before sale can be made. (See the remarks of the Supreme Court in *Jones v. Springer, infra.*)

Nor is it shown, in the opinion the undersigned, why if it is conceded that the petitioner Miller and anyone else purchasing at such a sale would be protected, that the judgment creditor himself must stand by and not be able to make a bid because he is chargeable with notice of insolvency. This again can be reduced to an absurdity because it can be shown that everyone purchasing at a judicial sale has knowledge of the insolvency of the debtor and that logically a levying creditor should have the same rights as anyone else to purchase at a judicial sale. In this case the credit upon the judgment was amplified by 250% approximately (see transcript) by the actions of the judgment creditor.

No rule of law nor reason suggests that the judgment of the District Court should be affirmed.

POINT THREE.

Aside From the California Law It Is the Policy and Plain Meaning of the Bankruptcy Act to Protect Purchasers at Judicial Sales.

In addition to the rather obvious reasons for protecting purchasers at judicial sales the Supreme Court itself in the case of *Jones v. Springer* (1912), 226 U. S. 148, 57 L. Ed. 161, 3 S. Ct. 64, 29 A. B. R. 204, has handed down a ruling protecting state court sales at execution or otherwise. The opinion was delivered by Justice Holmes. The case involved the question of the validity of a sale of personal property at execution even though the sale was conducted *after* the filing of the Bankruptcy Petition. It does not appear from the facts in the case whether the purchaser was the levying creditor. However, the reasoning of the Supreme Court is set forth in the body of the opinion in the following words:

“It is argued that if a sale was necessary, the court of bankruptcy could have directed it under General Order 18, 3, and that its power was exclusive. But such a rule would much impair the usefulness of the principle. The trustee, if appointed, may not know the condition of the property, or be prepared to decide. The court having the actual custody of the res does not know of the bankruptcy proceedings. There is a necessity for immediate action and no one is ready to act. If the local court, in its ignorance, directs a sale and the purchaser is chargeable with notice that there may be somewhere a petition filed that will destroy his title, the doubt affects the price that he will give, and if the sale turns out effective, the goods have been sacrificed. The very reason of the rule that permits a good title to be given by an authority that has none

contradicts the limitation supposed. We are of opinion that the power of the territorial court remained. 'For necessity (which is expected out of the law) the sale in that case is good.' 2 Co. Inst. 168. The proceeding is in rem, against all the world, the sale stands, and the claim of the trustee is transferred to the proceeds, which ordinarily must be presumed to represent the fair value of the goods and take their place."

The Bankruptcy Act itself provides for an exception in connection with judicial sales. The 1938 amendment of the Bankruptcy Act contains the following language in Section 67a(3) (11 U. S. C. A. 107):

"The property affected by any lien deemed null and void under the provisions of paragraph (1) and (2) of this subdivision shall be discharged from such lien, and such property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the trustee or debtor, as the case may be, except that the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be: *Provided, however, That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.*" (Emphasis supplied.)

Surprisingly enough, there has been little judicial interpretation of the above-quoted section. This may be because its meaning is evidently quite plain. Its obvious purpose is to protect the purchasers at a judicial sale and

to exclude such a purchaser from the operation of Section 67a of the Bankruptcy Act. Purchasers at judicial sales in their entirety are excluded and purchasers who may be said to be of good faith and bona fide purchasers have valid title to the extent of present consideration paid for the property.

Conceding, for the sake of argument only, that the appellants must still show and prove good faith it is appellants position that the emphasized portion of Section 67 of the Bankruptcy Act undoubtedly refers to knowledge of *pending bankruptcy proceedings*, *Jones v. Springer, supra*. That is to say, if an execution sale is held after the filing of a bankruptcy petition but before knowledge thereof is chargeable to the purchaser, he is still acting in good faith. On the other hand a good-faith purchaser, purchasing property from a bankrupt at any other sale than a judicial sale is protected only to the extent of present consideration paid.

In order to understand the intent of Congress, some guidance may be secured from the notes of the National Bankruptcy Conference concerning Section 67a(3) of the Bankruptcy Act and their analysis of it when it was under consideration in 1936-1938. (H. R. 12889—74th Cong. 2d Sess. 1936.) The comment of the conference is found in their analysis of the 1938 Bill in their bound volume containing notes at page 209. The following quotation is taken therefrom:

“The substance of this clause (3) is derived from the Subdivision (f) of the present Section 67. The limits in respect to the present consideration paid is derived from the present Section 67d, but is modified by excepting therefrom a purchaser at a judicial

sale. This exception is deemed to be necessary in the interest of protecting judicial sales. * * *

“The bona fide purchaser protected is obviously the purchaser from the original or any subsequent lien holder or transferor.”

The Trustee in Bankruptcy and his attorney have laid important stress upon the fact that the purchasing creditor (the appellant Abramson) had knowledge of the insolvent condition of the bankrupt concern at the time the execution sale was made. This fact is not denied and was readily admitted at the hearing held on the Receiver's petition.

Such knowledge of the fact of insolvency is and should be immaterial as far as the purchasers at execution sales are concerned.

In the first place anyone purchasing at a judicial sale is certainly chargeable with the knowledge or notice that the concern whose property is being sold is under a severe financial stress and difficulty. In the second place a logical extension of this argument would preclude the judgment creditor from participating in judicial sales at all by virtue of his more intimate knowledge of the affairs of the debtor concern. An absurd but equally permissible extension of this argument would completely nullify the possibility of conducting any judicial sale because any purchaser of goods at a judicial sale who could be said to have knowledge of insolvency of the debtor corporation or individual, as it may be, could have his title to the goods set aside if a bankruptcy petition were filed at any time within four months after the date of the sale.

A case which is on all four's with the case at bar is the case of *In re Weitzel* (D. C. N. Y., 1911), 191 Fed.

463, 27 A. B. R. 370. In this case property of a bankrupt was sold under a Writ of Execution upon a judgment obtained within the four months' period, the property in question being bought by the judgment creditor, the proceeds being applied toward payment of the judgment. The court ruled that the Receiver in bankruptcy had no right to retain such property against the judgment creditor under Section 67 of the Bankruptcy Act. The court said in this case as follows:

“In the present instance, therefore, the creditor who purchased the goods was in the position of a bona fide holder for value of the goods themselves. To the extent, he was entitled to hold the proceeds as satisfaction of his judgment, and the estate in bankruptcy would either have to deal with him through Sec. 60 of the Bankruptcy Act, relating to preferential transfers, or attack the transaction for fraud and collusion, if they are entitled to such relief. Under these circumstances, the receiver has no right to hold possession of the property against the judgment creditor, and the expense of his occupation must be paid by the petitioning creditors who gave the bond therefor.”

The foregoing case has never been overruled and has been followed in the District of New York since it was handed down.

Another case of extreme importance to the court in the consideration of this matter is the case of *In re Moore* (D. C. Ga., 1930), 42 F. 2d 475, 16 A. B. R. (N. S.) 174. This case is important because the Receiver throughout these proceedings has made an issue of the point that at the sale the petitioner Abramson had knowledge of the fact that the debtor corporation was insolvent and

in poor financial circumstances. This, again, is rebutted first, by the obvious argument to the effect that any concern whose property is being sold at an execution sale is clearly in dire financial stress and any purchaser who purchases at such a sale must know that. It is also rebutted by the ruling in the foregoing case which sets forth that judicial sales are protected irrespective of knowledge of insolvency so long as there is no notice or knowledge that petition in bankruptcy has been filed. In this case there was notice of an adjudication in bankruptcy which was brought to the proper attention of the state court officers but the court was careful to point out that notice to a purchaser refers to "notice of a pending or impending bankruptcy" and not to insolvency of the debtor corporation.

In the case of *Coppard v. Gardner* (Tex. Civ. App., 1917), 199 S. W. 650, 40 A. B. R. 777, the court again had the occasion to consider a judicial sale and the rights of a purchaser who had acquired the property *after* the filing of a bankruptcy. The court held in construing the old prior section of the bankruptcy law which included the phrase, "without notice or reasonable cause of inquiry" (which by the way has been deleted from the present statute) as follows:

"Notice of or inquiry about what? It must necessarily be about the matter treated of in the section which is the filing of the petition and would apply to purchases after the filing rather than before, because a purchaser could not have knowledge of a thing that did not exist when he purchased. He could not be held to be other than an innocent purchaser before the filing, unless he was perhaps guilty of fraud or collusion with the bankrupt. The only per-

sons charged by the act with notice of the filing of the petition in bankruptcy are the creditors of the bankrupt, and this is inferred from the fact that the only instances in which creditors shall receive notice are carefully selected and specified in the bankruptcy statute. No valid notice was given in the cases in which the sheriff acted in selling the property claimed by the trustee."

A similar result was reached in the matter of *Kentucky Book Manufacturing Company* (D. C. Ky., 1939), 42 A. B. R. (N. S.) 869, in which case a landlord who purchased the bankrupt's property at a distraint sale was held to be a bona fide purchaser so long as the sale was completed before the filing of any bankruptcy petition. In this case the purchaser was the judgment creditor, which makes it identical to the case at bar. The court said:

"It would seem, therefore, that the lien acquired by the landlord and perfected by the levy of the distress warrant was not one which was dissolved by the institution of bankruptcy proceedings within four months thereafter. The lien creditor had a right to enforce his lien by a judicial sale, and the title acquired by the purchaser at such a sale would not be favorable title by reason of any alleged preference a Title acquired by a bona fide purchaser at a judicial sale even where the lien being enforced is a favorable one, has been held to be good. In *Re Weitzel*, D. C. N. Y. 191 F. 463, In *Re Carr*, D. C. Pa. 39 F. 2d 912. Section 67 of the Bankruptcy Act specifically protects such a purchaser. If the lien being enforced by a judicial sale is not a favorable one, the purchaser stands in even a better position and his title can only be defeated by successfully attacking the validity of the sale."

No. 15531

United States
Court of Appeals
for the Ninth Circuit

G. ABRAMSON and HOWARD MILLER,
Appellants,
vs.

GEORGE GARDNER, Trustee in Bankruptcy of
the Estate of Feldman-Selje Corporation,
Bankrupt,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

JUL 29 1957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

No. 74,412—TC

In the Matter of:

FELDMAN-SELJE CORP.,

Bankrupt.

HEARING ON ORDER TO SHOW CAUSE,
GARDNER VS. ABRAMSON, ET AL., MO-
TION BY RESPONDENT TO DISMISS
PETITION

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came on for hearing before the Honorable Howard V. Calverley, United States Referee in Bankruptcy, at his courtroom, 339A Federal Building, Los Angeles, California, at the hour of 2:00 p.m., Thursday, October 25, 1956.

Appearances:

GEORGE GARDNER,

Receiver.

W. J. TIERNAN,

Appearing on Behalf of the Respondent.

The Referee: I will call the matter of Feldman-Selje Corporation, Bankrupt, No. 74,412—TC, Order to Show Cause, Gardner against Abramson, et al. I might state the schedules were filed this afternoon at 1:00 o'clock in this case.

Mr. Gardner: I presume, Mr. Tiernan, it will be

stipulated that the evidence adduced in connection with your motion to dismiss may be considered as evidence in the main case if your motion to dismiss is not granted.

Mr. Tiernan: That is certainly agreeable.

The Referee: That will save time.

Mr. Gardner: Mr. Fishman, will you take the stand?

Mr. Tiernan: I am ready to argue the motion.

Mr. Gardner: I am not ready yet.

The Referee: I think you had better put your evidence in and argue it afterward so the witnesses may be excused.

Mr. Gardner: Will you take the stand, Mr. Fishman?

STANLEY J. FISHMAN

called as a witness on behalf of the Receiver, having been first duly sworn, testified as follows:

The Referee: State your full name.

A. Stanley J. Fishman.

The Referee: Very well. You may proceed. [2*]

Direct Examination

By Mr. Gardner:

Q. Mr. Fishman, you are attorney for G. Abramson?
A. That is correct.

Q. Who is G. Abramson? Is he someone in your office?

A. That is correct. She is the secretary in the office.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Stanley J. Fishman.)

Q. She is an assignee of the claim of Meridan Furniture Company, Inc.?

A. That is correct.

Q. And also of Style Laminates, Inc.?

A. That is right.

Q. Those are creditors of Feldman-Selje Corporation. Is that right? A. That is right.

Q. You were her attorney and as such attorney you brought the Superior Court suit No. 665,581 against the Bankrupt?

A. I think that is the number. May I have my file, your Honor?

The Referee: Yes.

Mr. Tiernan: That is the number I have.

The Witness: Yes; that is correct.

Q. (By Mr. Gardner): That suit was filed on August 24, 1956, wasn't it?

A. Yes; that is correct; August 24. [3]

Q. At that time you caused the Marshal of the Municipal Court to levy a writ of attachment which was levied on August 27, 1956, a Monday, is that correct?

A. The suit was filed on Friday and the keeper was placed in the premises on Monday.

Q. If I told you August 27 was Monday, would that be the date? A. That is correct.

Q. Subsequently, about September 7, 1956, you obtained judgment by default against the Bankrupt, didn't you? A. Yes; that is correct.

Q. You got a writ of execution on it and you caused the Marshal to set an execution sale?

(Testimony of Stanley J. Fishman.)

A. That is true.

Q. When the execution sale came up it was on September 12, was it not? A. That is right.

Q. At that time there was a claim by the holders of an alleged chattel mortgage claiming all of the machinery and equipment, was there not?

A. In part, yes. They claimed a lot more than the machinery and equipment. They claimed office furniture and mostly everything.

Q. Then the Marshal of the Municipal Court offered for sale everything that was not included in that claim. [4] Is that right?

A. There were about three third-party claims. Everything that was not included in any of the third-party claims was offered for sale.

Q. At that execution sale the plaintiff, G. Abramson, was the purchaser?

A. Yes, but through myself as her attorney.

Q. You made a bid for \$500?

A. That is true.

Q. That \$500 was given as credit on the judgment in court? A. Yes.

Q. You did not pay any \$500 to the Marshal?

A. No. The \$500 was entered as a credit on the judgment.

Q. Subsequently you sold these same items to Howard Miller for \$500 in cash, didn't you?

A. That is true.

Q. Were any of these items ever removed from the place of business of the Bankrupt?

(Testimony of Stanley J. Fishman.)

A. I have no knowledge of that. I cannot answer from my own knowledge.

Q. Were you aware of the fact that the Bankrupt corporation had been negotiating with its creditors to try to get a settlement of the situation with them? A. With his creditors? [5]

Q. Yes. A. I was very much aware of it.

Q. You were very much aware of it. You knew the financial condition of the Bankrupt, did you not? A. Yes.

Q. As a matter of fact, you knew that it was insolvent, didn't you?

A. Yes. Your Honor, I believe I can shorten these proceedings with Mr. Gardner's permission.

The Referee: Go ahead.

The Witness: Out of the \$500 that Mr. Miller paid for the assets I bought for \$500 as a credit and sold for \$500 in cash in turn. I agree to turn that \$500 over to whomsoever the Court directs, reserving any right I may have to file a petition, that the attachment was made for the benefit of all creditors, and I should be allowed my costs. But I have the \$500 and I will agree to return it.

Q. (By Mr. Gardner): As I understand your testimony, you do not now assert that you claimed any adverse interest to other creditors when you bought this. You were doing it for the benefit of all creditors?

A. Not at this point. At this time my testimony is that I will turn the \$500 over to whomsoever the Court directs without contesting any preference ac-

(Testimony of Stanley J. Fishman.)

tion, to save you the trouble of bringing a preference action. That is all my testimony is for. [6]

Q. You were aware of the insolvent condition of the Bankrupt, weren't you? A. Yes.

Q. At the time you bought this in?

A. Yes.

Q. Howard Miller bought from you, didn't he?

A. Yes.

Mr. Gardner: You may cross-examine.

Cross-Examination

By Mr. Tiernan:

Q. Mr. Fishman, you attended the sale and made a bid of \$500 which was credited upon the judgment? A. Yes.

Q. Were other persons present at this sale?

A. Yes.

Q. Other bidders? A. Yes.

Q. Were other bids made?

A. Yes. There were about forty persons present.

Q. Were other bids made? A. Yes.

Q. What was the lowest bid made?

A. The bids started at \$50.

Q. What was the highest bid?

A. The highest bid was \$125. It was going to go for [7] \$125, and since I had a judgment for \$4,000 I didn't want to see it go for \$125, so I entered a bid of \$500 which was the top bid.

Q. Thereafter, on behalf of your client you ne-

(Testimony of Stanley J. Fishman.)

gotiated a sale of the personal property to one G. Abramson?

A. No; that is not correct. Howard Miller, my client.

Q. I beg your pardon. Howard Miller?

A. Yes.

Q. Did you execute a bill of sale to this personalty in favor of Mr. Miller? A. Yes; I did.

Q. Is this the bill of sale I am handing you?

A. Yes.

Mr. Tiernan: Do you have any objection to this, Mr. Gardner?

Mr. Gardner: None whatsoever.

The Referee: It may be received as Respondent Miller's Exhibit 1.

Q. (By Mr. Tiernan): Mr. Fishman, you mentioned in connection with your attachment that you had incurred certain costs for which you desired to reserve your rights to petition this Court for should you turn in this \$500. Can you tell me now what those costs amount to?

A. No; I couldn't tell you now. I have all of that [8] information in my office, the itemization of the costs. They were quite considerable because the keeper was on the premises from the 26th, after the suit was filed, all through the statutory period allowed to answer and for the period allowed for advertising of the execution sale. I roughly estimate they were in the vicinity of \$300 or possibly a little more or less.

Mr. Tiernan: I have nothing further.

Mr. Gardner: That is all, your Honor.

The Referee: You may step down.

(Witness excused.)

Mr. Gardner: I will call Murray Feldman.

MURRAY FELDMAN

called as a witness on behalf of the Receiver, having been first duly sworn, testified as follows:

The Referee: State your name, please.

A. Murray Feldman.

Direct Examination

By Mr. Gardner:

Q. Mr. Feldman, you were president of Feldman-Selje Corporation, the Bankrupt?

A. Yes.

Q. You were its president all during the month of August of this year? A. Yes. [9]

Q. You have filed on behalf of the corporation schedules in bankruptcy. May I ask you to look at the schedules, particularly the summary of debts and assets which shows debts of \$66,301.42 and assets of \$49,750?

Is that the condition of the Bankrupt financially as of the date of the filing of the petition in bankruptcy against it?

A. To the best of my knowledge, yes, it is.

Q. Was the financial condition of the Bankrupt any different from this present condition on August 27, the date of the attachment?

(Testimony of Murray Feldman.)

A. No; it was not.

Q. It was exactly the same? A. Exactly.

Q. Mr. Feldman, the Bankrupt had been trying to settle with its creditors for some time before this attachment, had it not?

A. We sent out a letter to all our general creditors between ten days and two weeks before the date of the attachment.

Q. Did that letter advise them of the financial condition of the Bankrupt?

A. It enclosed a balance sheet.

Q. Did the balance sheet show approximately the same figures that you have shown here?

A. The balance sheet was as of May 31 and [10] the condition was not quite as bad, but almost so.

Q. The company was insolvent? A. Yes.

Q. The statements showed that. Is that right?

A. Yes.

Q. Did a copy of that go to the Meridan Furniture Company, one of the creditors? A. Yes.

Q. Did a copy likewise go to Style Laminates, Inc.? A. Yes.

Mr. Gardner: You may cross-examine.

Mr. Tiernan: I have no questions.

Mr. Gardner: That is all.

The Referee: Very well. You may step down.

(Witness excused.)

Mr. Gardner: Will it be stipulated that I, as Receiver in Bankruptcy, am in possession of the items which were purported to have been sold?

Mr. Tiernan: I would be happy to take your statement, Mr. Gardner.

Mr. Gardner: All right. I will make a statement to that effect.

The Referee: You may be sworn, Mr. Gardner. Mr. Fishman said the only property sold was the property to which a third-party claim was made.

Mr. Gardner: That is right. [11]

The Referee: Very well. You may proceed.

GEORGE GARDNER

the Receiver herein, appearing in propria persona, having been first duly sworn, testified as follows:

I am the Receiver in this matter, having been so appointed on October 12, 1956. I caused the premises of the Bankrupt, located at 910 East Fourth Street, Los Angeles, California, and at 847 East Fourth Street, Los Angeles, California, to be taken over by my agent. I caused an inventory to be prepared which inventory is on file. I would like to introduce that inventory by reference.

The Referee: I don't see it in this file.

The Witness: It may be in the hands of the appraiser.

Mr. Tiernan: That is all right. What do you expect to prove?

The Witness: I expect to prove the values of the various items of property.

Mr. Tiernan: Is there an appraisal?

The Witness: The appraisal blank has gone out. This is an inventory. I will offer the inventory.

(Testimony of George Gardner.)

Mr. Tiernan: May I see it?

The Witness: You may see my office copy.

Mr. Tiernan: Very well. [12]

The Witness: The other is apparently out in the hands of the appraiser.

Mr. Tiernan: Are you able to relate the inventory items to the items sold at the sale?

The Referee: Are you able to tell which items were sold at the sale?

A. I think the items sold at the sale were what are known as supplies and stock as listed on the inventory, one being \$320.50 which is located at 910 East Fourth Street, and the other being supplies and stock inventoried at \$2,419.42, located at the other address of the place of business, 841 East Fourth Street. It is my understanding that constitutes the items which were attempted to be sold at the execution sale.

The Referee: I don't see how you can dispute the value of it unless you had your appraiser here.

The Witness: That is right. I would like then to be allowed the opportunity to introduce the appraisal as and when we receive it, as proof——

The Referee: As proof of the question of value?

A. I am still in possession of all this property. I am attempting to have all of the property sold by an auctioneer. I have a stipulation from the holder of the alleged chattel mortgage which will authorize the sale of the property claimed by them, being the office furniture, machinery, equipment and fixtures. I want to include the [13] supplies

(Testimony of George Gardner.)

and stock which is the property about which we are bringing this motion.

Q. How much rent is the Bankrupt obligated to pay where the merchandise is located?

A. \$587.50 a month.

Q. In both places?

A. The two together. You cannot move it. It will cost too much to consolidate it in one.

Q. If these particular items which were sold were not auctioned or otherwise sold at this time, how much bulk would they have?

A. They have considerable bulk. This has been work in process, desks partially completed. Perhaps Mr. Feldman can explain it better than I can.

Mr. Feldman: That is it exactly.

The Witness: Parts of desks not put together, parts in process.

The Referee: Mr. Feldman, you can answer from where you are sitting. How much space proportionately speaking do these items which were sold at the execution sale occupy in proportion to everything else that the company owns?

Mr. Feldman: Our total square footage was 15,000 feet. I would say that if everything was stored and stacked it could be done without damage to merchandise in a space of somewhere around 3,000 feet. [14]

The Referee: That would be all of the merchandise?

Mr. Feldman: Not including the machinery.

The Referee: But the items that were properly

(Testimony of George Gardner.)

sold at this execution sale, you believe it would take approximately 3,000 square feet to store it properly?

Mr. Feldman: Yes.

Mr. Gardner: Do you have any questions?

Mr. Tiernan: No questions.

The Referee: I will give you an opportunity to present that appraisal when it comes in, Mr. Gardner.

Mr. Gardner: Thank you, your Honor.

The Referee: Anything further?

Mr. Gardner: Just a moment. I want to be sure I have everything. I want to ask for one stipulation. If I cannot get it I will put Mr. Fishman back on the stand. That is the fact that none of this property alleged to have been sold was removed from the property. Is that correct, Mr. Fishman?

Mr. Fishman: No. I wouldn't say that because after the execution sale there was a couple of time-clock men who came to me and said, "You bought all these things at the execution sale. We didn't file third-party claims. Our timeclocks are on lease. Can we take the timeclocks?"

I said, "Yes, you can take the timeclocks." The matter was not in bankruptcy. As far as I knew, it was all right for them to take the timeclocks. [15]

Mr. Gardner: What about the other items? Are they still there?

Mr. Fishman: The cut wood and parts of desks?

Mr. Gardner: Yes.

Mr. Fishman: So far as I know, nothing has been removed.

(Testimony of George Gardner.)

Mr. Tiernan: I believe that is correct.

Mr. Fishman: I would like to state after it was sold to Mr. Miller I never visited the premises and I don't know what happened after that.

Mr. Gardner: I might state on my part that so far as anything being taken out of there other than what is in there now, I am not concerned with in this matter. I am only after what is there.

The Referee: Very well.

Mr. Gardner: That is all. I am ready to argue.

The Referee: Before you do that, Mr. Gardner, you submitted a petition to sell the assets through an auctioneer?

Mr. Gardner: Yes, and I have an order on it.

The Referee: Was it your object to have this property sold by an auctioneer?

Mr. Gardner: It is my idea to have it all sold by the auctioneer, including this property, because I think it would be to the best interests of all creditors. If I am successful in the order to show cause, it would be sold. [16]

The Referee: I have executed an order authorizing the Receiver to sell the assets, but it was executed after this notice of motion to dismiss was filed. I think the order would be premature unless it applies to merchandise that is not included.

Mr. Gardner: It does apply to it. It applies to everything under the stipulation.

The Referee: To everything?

Mr. Gardner: If I am successful in this order to

(Testimony of George Gardner.)

show cause, then I would sell this property, also, to the public at public sale.

The Referee: I think perhaps I should withhold entry of the order until this matter is decided.

Mr. Gardner: Very well. I will tell the auctioneer to hold up.

The Referee: Yes. Withhold the execution of the order you filed yesterday at 9:00 a.m. At 3:00 p.m. in the afternoon, 3:35 p.m., this Notice of Motion was filed. They were not submitted to me together. I assumed you were in agreement or something of that sort. That was the reason I signed the order, but I will withhold the execution of it. I think perhaps the best way would be to eradicate the signature and not allow it to be considered an executed order, otherwise I will make an order withholding it until further discussion.

Mr. Gardner: Your Honor misunderstands me. I would [17] like to proceed at least with the sale of the stuff that is under the chattel mortgage on which I have a stipulation.

The Referee: Then perhaps I had better let the order stand with the understanding that the other articles will not be sold unless——

Mr. Gardner: I am not selling them unless I am successful here:

The Referee: Then I will let the order stand. You may prepare to go ahead with the other without delay.

Mr. Gardner: That is what I am trying to do, save \$600 a month rent.

(Testimony of George Gardner.)

The Referee: I see the reason for your haste.

Mr. Fishman: May I ask Mr. Gardner a question?

The Referee: Yes.

Mr. Fishman: Mr. Gardner seemed to be slightly hazy as to which items on the appraisal were not sold at the execution sale. Do you have any copies of the third-party claims filed with the Marshal? There would be no problem if you do because they specifically list everything not sold.

Mr. Gardner: I have a copy of one that was filed which covers everything claimed by the holders of the chattel mortgage.

Mr. Fishman: There were three third-party claims. That would be the only exact way to separate the wheat from the [18] chaff.

The Referee: You would simply take the third-party claims and what would be left over was sold, what was not subject to chattel mortgage?

Mr. Fishman: That is my thought.

The Referee: It is a process of elimination.

Mr. Fishman: Yes.

The Referee: Before the auctioneer proceeded he would make sure what he was selling was within the order.

Mr. Gardner: Whatever copies of the claims that you have I would appreciate having because I have only one.

The Referee: All right, Mr. Tiernan.

(Argument omitted.) [19]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter, do hereby certify that the foregoing nineteen (19) pages comprise a true and correct transcript of the proceedings had in the above-entitled matter.

Dated this 28th day of November, 1956.

/s/ BYRON OYLER,
Official Reporter.

[Endorsed]: Filed November 30, 1956.

[Endorsed]: No. 15531. United States Court of Appeals for the Ninth Circuit. G. Abramson and Howard Miller, Appellants, vs. George Gardner, Trustee in Bankruptcy of the Estate of Feldman-Selje Corporation, Bankrupt, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 19, 1957.

Docketed: April 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15531

**United States
Court of Appeals
For the Ninth Circuit**

G. ABRAMSON and HOWARD MILLER,
Appellants,
vs.

GEORGE GARDNER, Trustee in Bankruptcy of
the Estate of Feldman-Seljé Corporation, Bank-
rupt,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

No. 15531

**United States
Court of Appeals
For the Ninth Circuit**

G. ABRAMSON and HOWARD MILLER,

Appellants,

VS.

GEORGE GARDNER, Trustee in Bankruptcy of
the Estate of Feldman-Seljé Corporation, Bank-
rupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

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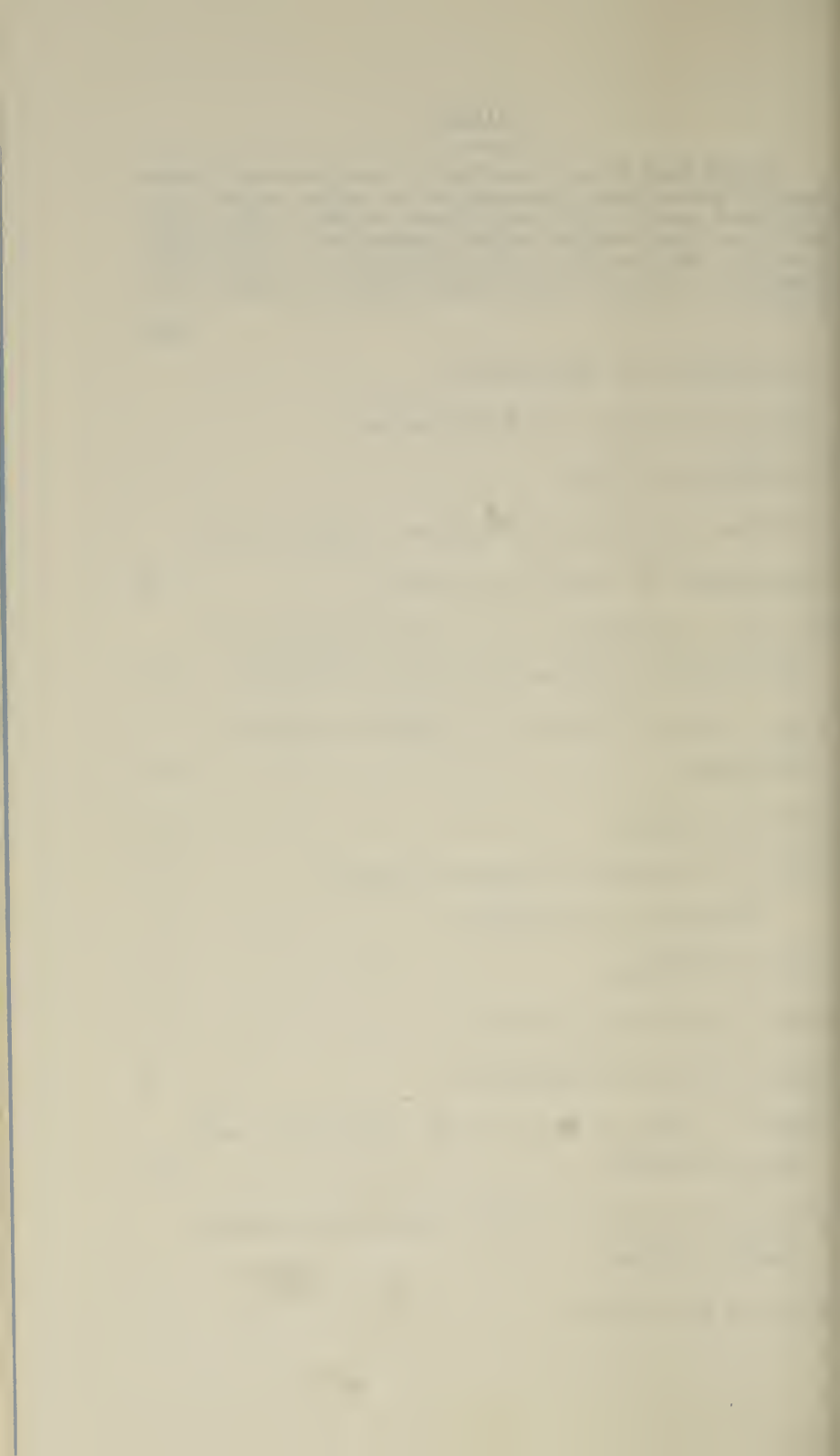
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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215 West Seventh Street, Suite 612,
Los Angeles 14, California.

For Appellee:

SAMUEL A. MILLER,
700 Lane Mtge. Bldg.,
Los Angeles 14, California.

In the District Court of the United States, Southern
District of California, Central Division

No. 74412-TC

In the Matter of:

FELDMAN-SELJÉ' CORPORATION,

Alleged Bankrupt.

CREDITOR'S INVOLUNTARY PETITION
IN BANKRUPTCY

The petition of Goldenberg Plywood & Lumber Co., Inc., a corporation, Sand Door & Plywood Co., a corporation, and Stahl Lumber Company, Inc., a corporation, respectfully represents as follows:

I.

That the alleged bankrupt, Feldman-Seljé Corporation, a California corporation, has heretofore been engaged in the manufacturing business at 910 East Fourth Street, Los Angeles, County of Los Angeles, State of California, within the above Judicial District and has had its principal place of business at said address for a longer portion of the six months immediately preceding the filing of this petition than in any other Judicial District, and owes debts in an amount in excess of \$1,000.00, and is not a wage earner nor a person engaged in farming or tillage of the soil, but at all times herein mentioned was a manufacturer operating at the address set forth in this allegation.

II.

That your petitioners are creditors of the said alleged bankrupt, having [2*] provable claims amounting in the aggregate of any securities held by them to the sum of \$500.00, the nature and amount of which are hereinafter more fully set forth.

III.

That your petitioners, Goldenberg Plywood & Lumber Co., Inc., Sand Door & Plywood Co. and Stahl Lumber Company, Inc., are each corporations doing business within the State of California and having offices and places of business in the County of Los Angeles, State of California.

IV.

That within two years last past the alleged bankrupt corporation became indebted to Goldenberg Plywood & Lumber Co., Inc., a corporation, in the sum of \$3,172.79 upon an open book account for goods, wares and merchandise sold and delivered; became indebted to Sand Door & Plywood Co., a corporation, in the sum of \$354.26 upon an open-book account for goods, wares and merchandise sold and delivered; became indebted to Stahl Lumber Company, Inc., a corporation, in the sum of \$1,378.92 upon an open book account for goods, wares and merchandise sold and delivered.

That the alleged bankrupt promised and agreed to pay the sums hereinabove indicated, which sums

*Page numbering appearing at foot of page of original Certified Transcript of Record.

were and are the reasonable value of the goods, wares and merchandise sold and delivered upon open book account. That all of said sums are now due, owing and unpaid; that no part thereof has been paid despite demand for the payment of said sums.

V.

That your petitioners allege that said alleged bankrupt is and was at all times herein mentioned insolvent, and on the 17th day of September, 1956, it admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt, and the written consent of the alleged bankrupt is filed concurrently herewith.

Wherefore, your petitioners pray that service of this petition, together with a subpoena, be made upon the alleged bankrupt as provided by law, and that it be adjudged by the Court to be a bankrupt within the purview of "The [3] Bankruptcy Act."

GOLDENBERG PLYWOOD & LUMBER CO.,
INC., a Corporation,

By /s/ JOSEPH M. GOLDENBERG,
Secretary-Treasurer;

SAND DOOR & PLYWOOD CO.,
A Corporation;

By /s/ FRED E. KOPPLIN, JR.,
Assistant Secretary;

STAHL LUMBER COMPANY,
INC.,

A Corporation;

By /s/ KENNETH W. FINCKLER,
Secretary-Treasurer.

/s/ SAMUEL A. MILLER,
Attorney for Petitioners.

Duly verified.

[Endorsed]: Filed October 1, 1956. [4]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 1st day of October, 1956;

Whereas, a petition was filed in this court on the 1st day of October, 1956, against Feldman-Seljé Corporation, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefore;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Howard V. Calverley, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Feldman-Seljé Corporation shall henceforth attend before said referee and submit to such

orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ LEON R. YANKWICH,
District Judge.

[Endorsed]: Filed October 1, 1956. [6]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, in said District, on the 10th day of October, 1956.

The petition of Goldenberg Plywood & Lumber Co., Inc., a corporation, Sand Door & Plywood Co., a corporation, and Stahl Lumber Company, Inc., a corporation, filed on the 1st day of October, 1956, that Feldman-Seljé Corporation, a corporation, and the alleged be adjudged a bankrupt under the Act of Congress relating to bankruptcy, bankrupt having consented to adjudication; and there being no opposing interest.

It is adjudged that the said Feldman-Seljé Corporation, a corporation, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ HOWARD V. CALVERLEY,
Referee in Bankruptcy.

[Endorsed]: Filed October 11, 1956. [7]

[Title of District Court and Cause.]

ORDER APPOINTING RECEIVER

It appearing to the undersigned Referee that the appointment of a receiver is necessary to preserve the estate of the above-named bankrupt and to prevent loss thereto,

It is ordered that George Gardner, of Los Angeles, in said district, be, and he hereby is, appointed receiver of the estate of said bankrupt until the appointment and qualification of a trustee herein; and

It is further ordered that all persons, firms and corporations, including the said bankrupt and all attorneys, agents, officers and servants of the said bankrupt, forthwith deliver to said receiver all property of whatsoever nature and wheresoever located, including lands and buildings, chattels, merchandise, accounts, notes and bills receivable, drafts, checks, moneys, securities, and all other choses in action, account books, records, and all life and fire insurance policies, and all other insurance policies in the possession of them, or any of them, and owned by the said bankrupt; and

It is further ordered that the duties and compensation of said receiver are hereby extended beyond those of a mere custodian, within the meaning of Section 48 of the Bankruptcy Act, and that said receiver be, and he hereby is, authorized and empowered to continue and carry on the business as

conducted by the said bankrupt, for a period of ten days from date hereof; to take such proceedings as may be necessary to enable him to obtain possession of the property of said bankrupt; to prepare a complete inventory of all the property of the said bankrupt that comes into his possession; to collect all moneys owing to the said bankrupt or to which he may be entitled; and, subject to the Postal Laws and Regulations of the United States, to receive all mail addressed to the said bankrupt; and

It is further ordered that before entering upon his duties said receiver shall furnish a bond in the sum of \$2500.00, with a sufficient surety or sureties, to be approved by the Court.

Dated: October 12, 1956.

/s/ HOWARD V. CALVERLEY,
Referee in Bankruptcy. [8]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
RE SETTING ASIDE OF SALE

The Petition of George Gardner represents to this Court that he is the duly appointed, qualified and acting Receiver in Bankruptcy of the above-named bankrupt corporation, which was adjudicated a bankrupt on an Involuntary Petition in Bankruptcy filed against it on October 1st, 1956.

That your Petitioner is informed and believes, and upon such information and belief alleges, that one G. Abramson, as Assignee of the claims of Meridian Furniture Co., Inc., and Style Laminates, Inc., caused a suit to be filed in the Superior Court of the State of California in and for the County of Los Angeles, being No. 665-581, against the above-named bankrupt, on or about August, 24th, 1956, and that subsequently, and to wit, on or about August 27th, 1956, the said G. Abramson caused the Marshal of the Municipal Court of Los Angeles to levy a Writ of Attachment upon the place of business of the above-named bankrupt, at 904 East 4th St., Los Angeles, California, and to place a keeper therein. That subsequently, on or about September 7th, 1956, said Plaintiff obtained a judgment by default against the said bankrupt, and caused a Writ of Execution to be placed in the hands of said Marshal of the Municipal Court, and that pursuant to said Writ of Execution, the said Marshal caused certain office furniture, work in process, and supplies, the exact description being unknown to your Receiver, to be offered for sale on September 12th, 1956, and did purport to sell said items above mentioned to the said Plaintiff, G. Abramson, for the crediting by the said Plaintiff of the sum of \$500.00 upon the judgment so held by her.

That your Receiver is further informed and believes, and upon such information and belief alleges, that the said G. Abramson did [9] subsequently

offer said items above mentioned to one Howard Miller, of 5341 Garden Grove, Tarzana, California, for the sum of \$500.00 cash, which sum was paid to her by the said Howard Miller. That your Receiver is informed and believes, and upon such information and belief alleges, that the said G. Abramson is holding the said \$500.00 to be delivered to whomsoever the Court may find to be entitled to receive it.

That your Receiver is informed and believes, and upon such information and belief alleges, that the items so attempted to be sold were never removed from the premises of the bankrupt, and that your Receiver found them in said premises when your Receiver took possession, and that your Receiver is now in possession of them.

That your Receiver is informed and believes, and upon such information and belief alleges, that the items so attempted to be sold for the sum of \$500.00, are of the value of over \$1,500.00, and your Receiver is also informed and believes, and upon such information and belief alleges, that the said Plaintiff, G. Abramson, knew of the insolvent condition of the said bankrupt at the time of the said execution sale, and is asserting that her said attachment and execution were for the benefit of all creditors.

That if allowed to stand, the said execution sale would be preferential so far as the said G. Abramson is concerned; that the lien obtained by the attachment and execution was a lien obtained by legal

proceedings, within four months of bankruptcy, upon property of the bankrupt, and at a time when the bankrupt was insolvent, and would have been void as against the Trustee in Bankruptcy to be appointed herein, had not the purported sale taken place. That the title attempted to be asserted by the said G. Abramson is not the title of a bona fide purchaser, for the reason that no consideration was paid except the giving of a credit on the judgment, which would be a preference.

That so far as the said Howard Miller is concerned, his said title was acquired by a private transaction between himself and the said G. Abramson, and not at a judicial sale, and that therefore, by the terms of Section 67-A-3 of the Bankruptcy Act, his title is valid only to the extent of the consideration which he paid, to wit, the sum of \$500.00, [10] which the said G. Abramson stands ready to refund to him.

That rental on the Bankrupt's premises amounts to almost \$600.00 per month, and that it is imperative that your Receiver dispose of the assets of this estate and remove from said premises as quickly as possible, to avoid further loss. That your Receiver has demanded that the said G. Abramson and Howard Miller, and each of them, give up and surrender to your Receiver any title which they or either of them may assert in the said property, so that your Receiver may proceed to sell the same, but that the said Howard Miller refuses to surrender his claims of title, and the said G. Abramson

refuses to surrender her claims of title unless it shall be found that the said Howard Miller has no valid claim of title.

Wherefore, your Receiver prays that an Order to Show Cause be issued herein, directed to (1) G. Abramson, whose address is c/o Stanley J. Fishman, Esq., 416 West 8th St., Los Angeles, 14, California, her attorney of record, and (2) Howard Miller, whose address is 5341 Garden Grove Ave., Tarzana, California, and whose Attorney is W. J. Tiernan, Esq., 215 W. 7th St., Suite 1314, Los Angeles, 14, California, and that they and each of them be ordered and directed to be and appear before this Court at its Courtrooms, on a day certain, then and there to show cause if any they or either of them may have, why it should not be ordered and decreed that the purported execution sale to said G. Abramson is preferential and void as against the Trustee to be appointed herein, and why it should not be set aside; and why it should not be ordered and decreed that the claim of title asserted by the said Howard Miller is valid only to the extent of the consideration which he paid for said property, to wit, the sum of \$500.00; and why it should not be ordered and decreed that the said G. Abramson must refund to the said Howard Miller the said \$500.00 being now held by her as aforesaid, and that thereupon the said Howard Miller shall have no further right, title or interest in or to the said property involved; and why the Receiver herein should not be authorized and directed to sell all of the said property as an asset

of this bankrupt estate, free and clear of the [11] claims of the said G. Abramson and the said Howard Miller, or anyone claiming by or under them or either of them; and for such other and further relief as to the Court may seem fit and proper in the premises.

/s/ **GEORGE GARDNER,**
Receiver in Bankruptcy.

Duly verified.

[Endorsed]: Filed October 19, 1956. [12]

[Title of District Court and Cause.]

**ORDER TO SHOW CAUSE ON G. ABRAMSON
AND HOWARD MILLER**

Upon reading and filing the verified Petition of George Gardner, Receiver herein, good cause appearing,

It Is Ordered, That G. Abramson, (whose address is c/o Stanley J. Fishman, Esq., 416 West 8th St., Los Angeles, 14, California, her attorney of record), and Howard Miller, (whose address is 5341 Garden Grove Ave., Tarzana, California, and also c/o his attorney, W. J. Tiernan, Esq., 215 West 7th St., Suite 1314, Los Angeles 14, California) and each of them, be and appear before this Court, at its Courtrooms, 339 Federal Bldg., Los Angeles, California, on the 25th day of October, 1956, at 2:00 o'clock p.m., then and there to show cause, if any

they or either of them may have, why the prayer of the Receiver's Petition should not be granted.

It Is Further Ordered, That a certified copy of this Order to Show Cause, together with a copy of the Petition on which the same is based, be served upon the said Respondents and each of them, either personally, or by Certified Mail, Return Receipt Requested, at least two (2) days prior to the date set for the hearing of this Order to Show Cause, time for service being shortened accordingly.

It Is Further Ordered That if service by Certified Mail is made, it shall be sufficient to address the Respondent G. Abramson c/o Stanley J. Fishman, Esq., 416 West 8th St., Los Angeles 14, California, and to address the Respondent Howard Miller at his home address, 5341 Garden Grove Ave., Tarzana, California, and to also send a copy of said Order to Show Cause together with copy of the said Petition, by ordinary mail, to his said attorney, W. J. Tiernan, Esq., 215 West 7th St., Suite 1314, Los Angeles 14, California.

Dated: October 19, 1956.

/s/ HOWARD V. CALVERLEY,
Referee in Bankruptcy.

[Endorsed]: Filed October 19, 1956. [13]

[Title of District Court and Cause.]

NOTICE OF MOTION TO
DISMISS PETITION

To George Gardner, Receiver.

You will please take notice that the undersigned will, as counsel for the respondents, move the court for an order dismissing the petition re setting aside of sale.

This motion will be made before the Honorable Howard V. Calverley, Referee in Bankruptcy, at his courtroom in the Federal Building, Temple and Spring Streets, Los Angeles, California, October 25, 1956, at the hour of two o'clock p.m., or as soon thereafter as said matter may be heard.

Said motion will be made and will be based upon this Notice of Motion, the allegations of the aforesaid petition and upon the grounds that said petition does not state a claim as against these respondents and upon the ground that the receiver is not a qualified person to bring such proceedings, and upon the third ground that the court has no jurisdiction over these respondents or the property which is the subject of said petition.

/s/ WILLIAM J. TIERNAN,

Attorney for Respondents. [14]

Points and Authorities

Point I: A Receiver in Bankruptcy Is a Mere Custodian and Has No Title to Property.

The allegations of the petition show that the same is filed on behalf of a receiver rather than a trustee. The receiver is attempting to establish title to property as well as to recover the sum of money alleged to be a preference. In neither case is the receiver a proper judicial officer to bring such an action. Pending the qualification of a trustee, a receiver is a mere custodian of property.

The foregoing point was decided by Judge Yankwich of this district in the matter of Club New Yorker, 30 Am. B. R. (N.S.), Page 650, where the court said, at Page 654:

“There can be no summary turnover at the behest of a receiver in bankruptcy. In *re Fuller* (C.C.A. 2d Cir., 1923) 2 Am. B. R. (N.S.) 149, 294 F 71; In *re Oliver* (D.C., Mich., 1924), 4 Am. B. R. (N.S.) 590, 298 F 671. Rightly so, because the receiver in bankruptcy takes no title to the property. He is a mere custodian until trustee takes charge following adjudication. And while he may take over property as to which there is no dispute, he is not entitled to take possession of any property against which a claim of title is made by others.”

Point II: A Judgment Creditor Is a Bona Fide Purchaser at Execution Sale.

The facts show that the respondents purchased personal property at execution sale prior to the filing of a bankruptcy petition. Good faith and lack of knowledge of any pending bankruptcy proceeding show that the respondent is a bona fide purchaser.

This has been decided in California in the case of *Pepin vs. [15] Strickland* (1931) 299 P. 557. 114 CA 32.

It has also been decided that the purchaser of personal property at an execution sale is entitled to the immediate possession thereof. (See Sections 698-699 of CCP of the State of California and see the case of *Holm vs. Overholt* (1932), 6 P. 2d 76, 214 C 431.

Point III: The Bankruptcy Act Itself Protects Bona Fide Purchasers at a Jurisdictional Sale.

Section 67a (3) of the Bankruptcy Act dealing with property subject to a jurisdictional lien provides:

“That the title of a bona fide purchaser of such property shall be valid but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.”

It is particularly true that where the transaction and the sale have been completed prior to the filing of the bankruptcy petition no lien exists for the trustee to set aside under Section 67a. In such a situation the trustee has only the remedy of reaching the proceeds of the sale in the hands of a creditor under the provisions of Section 60 of the Act; i.e., to recover a preference.

This is the position taken by Collier on Bankruptcy in Volume IV at Page 164:

“But if the transaction is complete, so far as the creditor is concerned, at the time the petition is filed, then no lien remains for Section 67a to affect (citing cases). Yet the trustee may be able in some cases to reach the proceeds of the sale in the hands of the court officer making it. Or, the creditor may be subjected to a plenary suit for the recovery of the property or its [16] purchase price paid to him as a recoverable preference under Section 60.”

Respectfully submitted,

/s/ WILLIAM J. TIERNAN,
Attorney for Respondents.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 24, 1956. [17]

In the District Court of the United States for the
Southern District of California, Central Division

No. 74412—TC

In the Matter of

FELDMAN-SELJE CORPORATION, a Corpo-
ration,

Bankrupt.

FINDINGS, CONCLUSIONS, AND ORDER RE
ORDER TO SHOW CAUSE AGAINST
ABRAMSON AND MILLER

The Receiver herein, George Gardner, having filed herein his duly verified Petition for Order to Show Cause Re Setting Aside of Sale, and an Order to Show Cause having been duly issued thereon directed to G. Abramson and to Howard Miller, and each of them, as Respondents, and the matter coming on duly to be heard on October 25th, 1956, at 2:00 p.m., the Receiver appearing in propria persona, and the Respondent G. Abramson appearing by her Attorney, Stanley J. Fishman, Esq., and the Respondent Howard Miller, appearing by his Attorney, W. J. Tiernan, Esq., and the said Respondents through W. J. Tiernan, Esq., having moved the Court for an Order dismissing the Petition Re Setting Aside of Sale, and the Court having heard the evidence in connection with the Motion as well as the evidence in connection with the Order to Show Cause, and being fully advised in the premises, now finds the following facts:

Findings of Fact

The Court finds that except as herein modified, the facts set forth in the Receiver's Petition are true.

That the said Receiver, George Gardner, is in possession of all of the property involved in this controversy, and that neither of the Respondents is in possession thereof.

That the property involved in this controversy is of the value of \$1,700.00, as found by the Court Appraiser; and that the sum of \$500.00 is not a fair consideration for the property involved in this controversy.

That the Respondent G. Abramson, as Assignee of the claims of Meridian Furniture Co., Inc., and Style Laminates, Inc., caused a suit to be filed in the Superior Court of the State of California in and for the County of Los Angeles, being No. 665-581, against the above-named [19] bankrupt, on or about August 24th, 1956, and that subsequently, and to wit, on or about August 27th, 1956, the said G. Abramson caused the Marshal of the Municipal Court of Los Angeles to levy a Writ of Attachment upon the place of business of the above-named bankrupt, at 904 East 4th St., Los Angeles, California, and to place a keeper therein; and that subsequently, on or about September 7th, 1956, said Plaintiff obtained a judgment by default against the said bankrupt, and caused a Writ of Execution to be placed in the hands of the said Marshal of the Municipal Court, and that pursuant to said Writ

of Execution, the said Marshal caused certain work in process and supplies (being the items listed as "Supplies and Stock" in the Receiver's Inventory on file herein, and being the property in controversy herein), to be offered for sale on September 12th, 1956, and did purport to sell said items to the said Plaintiff, G. Abramson, for the crediting by her of the sum of \$500.00 upon the judgment so held by her. And the Court further finds that the said Respondent G. Abramson did subsequently attempt to sell the said property in controversy to the Respondent Howard Miller for the sum of \$500.00 cash, and executed a Bill of Sale to said Howard Miller. And that the said Respondent G. Abramson is holding the said \$500.00 to be delivered to whomsoever the Court may find is entitled to receive it.

That the lien obtained through the said attachment and the said execution, was a lien upon property of the bankrupt, obtained by legal proceedings, within four months of bankruptcy, and at a time when the bankrupt was then insolvent.

That the property in controversy was never removed from the premises of the bankrupt, and that on or about October 1st, 1956, an Involuntary Petition in Bankruptcy was filed against the bankrupt and said bankrupt was adjudicated on or about October 10th, 1956, and when the Receiver took possession of the premises of the said bankrupt, the property in controversy was still there, and the Receiver took possession thereof, and is now in possession.

That at the time the Respondent G. Abramson caused the Attachment to be levied, and at all times thereafter, the bankrupt was wholly [20] insolvent, and that the said Respondent G. Abramson not only had reasonable cause to believe, but had actual knowledge of said fact; and that the said Respondent G. Abramson knew when she attempted to purchase the said property at said execution sale by giving a credit of \$500.00 on her judgment, that she was obtaining a preference over other creditors of the same class, and knew that in the event of bankruptcy within four months of such attempted preferential purchase, she would be required to surrender the said preference; and that therefore, she was not a bona fide purchaser at said judicial sale, but was attempting to obtain a preference over other creditors of the same class.

That the purported sale by the Respondent G. Abramson to the Respondent Howard Miller, was a private sale and not a judicial sale; and that the \$500.00 paid by Respondent Howard Miller was not the fair equivalent value of said property; and that the title obtained by said Howard Miller is valid only to the extent of the \$500.00 which he paid; and that upon the return to him of said \$500.00, he has no further right, title or interest in or to any of the property in controversy.

And from the foregoing facts, the Court concludes:

Conclusions of Law

The Court concludes that, being in possession of the property in controversy, the Court has summary jurisdiction to determine all of the questions of title to said property advanced by said Respondents and each of them.

That the Motion to Dismiss should be denied.

That when the Respondent G. Abramson attempted to purchase the property in controversy for the giving of a credit of \$500.00 upon her judgment, she was attempting to obtain a preference over other creditors of the same class, which preference this Court has the right to summarily set aside.

That so far as the transaction between Respondent G. Abramson and Respondent Howard Miller is concerned, since the \$500.00 paid by Miller was not the fair equivalent value of the said property, the purported sale only transferred to the said Howard Miller the title to the [21] property subject to the right of the Bankruptcy Court to set aside the attempted preference obtained by the said G. Abramson, and that the title of said Howard Miller is only valid to the extent of the \$500.00 which he paid, and which he is entitled to have returned to him.

The Court further concludes that the said Respondent G. Abramson should be ordered to refund the said \$500.00 which she is holding, to the said Howard Miller.

The Court further concludes that the title to the property in controversy is vested in the Trustee to be hereafter appointed in this matter, and is an asset of this bankrupt estate, free and clear of the claims of the Respondents G. Abramson and Howard Miller, or either of them, and anyone claiming by or under them or either of them.

That the prayer of the Receiver's Petition should be granted, and that the Receiver should be permitted to include the property in controversy, in the Auction Sale of the assets of this estate which sale has heretofore been authorized by this Court to save excessive rental expense.

Wherefore, It Is Ordered, That the Motion to Dismiss be, and the same is hereby denied; that the prayer of the Receiver's Petition be and the same is hereby granted, and that the property in controversy is the property of this bankrupt estate, free and clear of any claim or lien on the part of the said Respondents G. Abramson and Howard Miller, or either of them, or of anyone claiming by or under them or either of them.

It Is Further Ordered, That the \$500.00 being held by the Respondent G. Abramson, is the property of the Respondent Howard Miller, and the said Respondent G. Abramson is hereby ordered and directed to forthwith pay over said \$500.00 to the said Howard Miller.

It Is Further Ordered, That the Receiver be and he is hereby authorized and directed to include the

property in controversy, in the Auction Sale being conducted on November 7th, 1956, but is directed to keep [22] the proceeds from the sale of such items in controversy, separate from the other moneys of this estate until this Order shall become final, or until the further Order of this Court.

Dated: November 6, 1956.

/s/ HOWARD V. CALVERLEY,
Referee in Bankruptcy.

Approved as to form.

W. J. TIERNAN and
STANLEY J. FISHMAN,

By /s/ WILLIAM J. TIERNAN,
Attorneys for Respondents.

[Endorsed]: Filed November 6, 1956. [23]

[Title of District Court and Cause.]

PETITION FOR REVIEW

The verified petition of G. Abramson and Howard Miller respectfully represents to the court:

I.

That on or about the 7th day of November, 1956, the Honorable Howard V. Calverley made and entered an order in these proceedings as follows:

“Wherefore, It Is Ordered, That the Motion to Dismiss be, and the same is hereby denied;

that the prayer of the Receiver's Petition be and the same is hereby granted, and that the property in controversy is the property of the bankrupt estate, free and clear of any claim or lien on the part of the said Respondents G. Abramson and Howard Miller, or either of them, or of anyone claiming by or under them, or either of them.

“It Is Further Ordered, That the \$500.00 being held by the Respondent G. Abramson, is the property of the Respondent Howard Miller, and the said Respondent G. Abramson is hereby ordered and directed [24] to forthwith pay over said \$500.00 to the said Howard Miller.

“It Is Further Ordered, That the Receiver be and he is hereby authorized and directed to include the property in controversy, in the Auction Sale being conducted on November 7th, 1956, but is directed to keep the proceeds from the sale of such items in controversy, separate from the other moneys of this estate until this Order shall become final, or until the further Order of this Court.”

II.

That your petitioners are aggrieved by said Order and complain of certain errors in respect thereto as follows, to wit:

(1) That the motion to dismiss the petition of the Receiver for the grounds set forth in said motion should have been granted.

(2) That the Respondent Abramson is and was a bona fide purchaser of the personal property involved, having purchased the same at a judicial sale before the filing of a bankruptcy proceedings or any knowledge with respect thereto.

(3) That the Respondent Miller was and is a bona fide purchaser for value of the same personalty, who also purchased without notice or knowledge of any defect in any title from his transferor.

(4) That the entire transaction having been completed before bankruptcy, there was no lien for the bankruptcy court to set aside but only a voidable preference to recover the sum of \$500.00.

III.

Petitioners respectfully request that the Honorable Referee forward with his certificate the following documents:

(1) The petition of the Receiver re Setting Aside Sale.

(2) The Order to Show Cause on G. Abramson and Howard Miller.

(3) The order appointing a receiver.

(4) The Notice of Motion to Dismiss the petition. [25]

(5) The affidavit of Service.

(6) A Reporter's transcript of the hearing held on October 25, 1956, at 2:00 p.m.

(7) The Findings of Fact, Conclusions of Law and Order re G. Abramson and Howard Miller.

- (8) This petition for review.
- (9) All exhibits introduced into evidence.

/s/ WILLIAM J. TIERNAN,
Attorney for Respondents.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1956. [26]

February 26, 1957.

Mr. Samuel A. Miller,
Attorney at Law,
700 Lane Mtge. Bldg.,
Los Angeles 14, Calif.

Mr. William J. Tiernan,
Attorney at Law,
215 W. 7th St.—Suite 612,
Los Angeles 14, Calif.

Gentlemen:

Re: 74412—TC Bkey., Feldman-Seljé Corp.,
Bankrupt.

On the Court's own motion, an order has been entered this day affirming the Findings and conclusions of the Referee on the hearing heretofore heard and taken under submission.

JOHN A. CHILDRESS,
Clerk. [28]

[Title of District Court and Cause.]

NOTICE OF RULING

To G. Abramson and Howard Miller, and to William J. Tiernan, Their Attorney:

You and Each of You Will Please Take Notice that the Honorable Thurmond Clarke, United States District Judge, did on the 26th day of February, 1957, enter an Order affirming the Findings and Conclusions of Referee Howard V. Calverley on your Petition for Review heretofore heard and taken under submission by the Honorable Thurmond Clarke, United States District Judge, under date of February 25, 1957, and you and each of you will govern yourselves accordingly.

Dated: February 27, 1957.

/s/ SAMUEL A. MILLER,
As Attorney for Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 28, 1957. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the United States District Court,
and to George Gardner, Trustee in Bankruptcy, and to His Attorney, Samuel A. Miller:

You and Each of You Will Please Take Notice:

That the undersigned as Counsel for the parties named herein does hereby give notice of appeal in manner following, to wit:

I.

That the parties taking this appeal are G. Abramson and Howard Miller.

II.

That the judgment, order, or rule appealed from is the judgment or ruling of the Honorable Thurmond Clarke, entered and made on the Court's own motion on or about February 26, 1957, which said order, judgment or ruling affirmed the Findings of Fact, Conclusions of Law, and Order, Judgment, or Ruling of the Honorable Howard V. Calverley made by said Referee on or about the 7th day of November, 1956. [31]

III.

That the Court to which this appeal is taken is the United States Court of Appeals for the 9th Circuit.

/s/ WILLIAM J. TIERNAN,
Attorney for G. Abramson and Howard Miller, Appellants

[Endorsed]: Filed March 13, 1957. [32]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 35, inclusive, containing the original Petition in Bankruptcy; Order of General Reference; Adjudication of Bankruptcy; Order Appointing Receiver; Petition for Order to Show Cause re Setting Aside of Sale; Order to Show Cause on G. Abramson and Howard Miller; Motion & Notice of Motion to Dismiss Petition & Points & Authorities (together with Affidavit of Service by Mail); Findings, Conclusions, and Order re Order to Show Cause against Abramson and Miller; Petition for Review; Notification of entry of affirmation of Findings & Conclusions, etc.; Notice of Ruling; Notice of Appeal; Designation of Record and Points on Appeal.

B. 1 volume of reporter's transcript of proceedings for October 25, 1956.

C. Respondent Miller's exhibit 1.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 18th day of April, 1957.

[Seal]

JOHN A. CHILDRESS,
Clerk;

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15531. United States Court of Appeals for the Ninth Circuit. G. Abramson and Howard Miller, Appellants, vs. George Gardner, Trustee in Bankruptcy of the Estate of Feldman-Selje Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 19, 1957.

Docketed: April 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15531

In the Matter of:

FELDMAN-SELJE CORP.,

Bankrupt.

DESIGNATION OF POINTS ON APPEAL

1. Were the proceedings instituted by the Trustee under Section 67 of the Bankruptcy Act proper?

2. Did the appellant, Abramson, acquire title to the personal property at the execution sale?

3. Did the appellant, Howard Miller, acquire title to the personal property from Abramson?

4. Should the proceedings have been instituted under Section 60 of the Bankruptcy Act to recover a preference rather than to invalidate a lien under Section 67?

5. Can the filing of a bankruptcy divest Abramson or Miller of title once acquired?

6. Is the appellant, Abramson, a bona fide purchaser of the property?

7. Are sales at execution excluded from the operation of Sections 60 and 67 of the Bankruptcy Act?

Dated: April 25, 1957.

/s/ WILLIAM J. TIERNAN,
Attorney for the Appellant.

[Endorsed]: Filed April 26, 1957.

Docket No. 15532

United States Court of Appeals
For the Ninth Circuit

ARTHUR L. LAWRENCE and ALMA P. LAWRENCE
Petitioners-Appellants

VS.

COMMISSIONER OF INTERNAL REVENUE
Respondent-Appellee

ON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

BRIEF FOR APPELLANTS

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS
BROCKMAN ADAMS
MAX D. CRITTENDEN

Attorneys for Appellants.

15th Floor, Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

JUL 17 1957

PAUL P. O'BRIEN, CL.

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United States Court of Appeals

For the Ninth Circuit

ARTHUR L. LAWRENCE and ALMA P. LAW-
RENCE,

Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

} Docket No.
15532

ON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Tax Court in cause No. 53929 is found in the transcript (R. 35-51) and is officially reported as 27 T.C. No. 82.

JURISDICTION

Jurisdiction of this court is based on a petition for review (R. 52-53) of a decision of the Tax Court of the United States entered January 31, 1957 (R. 51), declaring a deficiency in appellants' 1948 federal income tax in the amount of \$2,931.14, plus interest (R. 51). The appellants' 1948 Federal Income Tax Return was filed in the collector's office in Los Angeles, California, and the petitioners reside within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Jurisdiction of this court is invoked

pursuant to U.S.C. Title 26, §7482(a). The venue is established by U.S.C. Title 26, §7482(b)(1).¹

QUESTIONS PRESENTED

1. Should the Commissioner be allowed to extend the statute of limitations period for assessment and collection from three years to five years by use of §275(c) of Internal Revenue Code of 1939, as amended?

2. Can the Tax Court properly refuse to follow a clear and unequivocal decision of the Court of Appeals to which the taxpayer has the right to appeal because of his residence and place of filing his federal income tax return?

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are §275(a) and §275(c) of the Internal Revenue Code of 1939, as amended, which state as follows:

“SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

“Except as provided in section 276—

“(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * *

¹ (b) Venue.—

(1) *In general*.—Except as provided in paragraph (2), such decisions may be reviewed by the United States Court of Appeals for the circuit in which is located the office to which was made the return of the tax in respect of which the liability arises, or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

“(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.”

STATEMENT OF THE CASE

The facts in this case are stipulated (R. 16-34). There was no testimony taken before the Tax Court and the matter was submitted on written briefs without oral argument. The facts may be summarized as follows:

The appellants are husband and wife and as such they filed a joint federal income tax return for 1948 with the Collector of Internal Revenue, Los Angeles, California, on May 31, 1949, pursuant to extensions agreed to between appellants and respondent. The respondent's Notice of Deficiency was not mailed until May 10, 1954, nearly five years after the filing of the original return. The only question presented to the Tax Court by the appellants was whether the Commissioner should be allowed to extend the statute of limitations period for assessment and collection from three years to five years by use of §275(c) of Internal Revenue Code of 1939, as amended.

The respondent Commissioner assessed a deficiency on the theory that the taxpayers had improperly reported the amount of long-term capital gain received upon the distribution of assets in the liquidation of

Midway Peerless Oil Company on December 15, 1948 (R. 33-34). This asserted deficiency was then stated by the Commissioner to be a 25% omission from gross income thus extending the statute of limitations to five years so that Commissioner's assessment of tax on May 10, 1954, would be valid (R. 17, R. 33-34).

The item of income received by appellants which was in dispute for the year 1948 concerned the amount of long-term capital gain derived by appellant, Arthur L. Lawrence, upon the distribution in complete liquidation of Midway Peerless Oil Company on December 15, 1948 (R. 17). The appellant, Arthur L. Lawrence, had acquired 2,111 shares of Midway Peerless Oil Company stock on April 7, 1942, which amounted to 4.342094% of the outstanding stock (R. 17). Upon dissolution of Midway Peerless Oil Company on December 15, 1948, the appellant, Arthur L. Lawrence, received his interest in the form of a participating royalty plus other items consisting of an interest in leasehold equipment, buildings-employee cottages, and inventories, plus cash and other assets (R. 29, 33).

The taxpayer in reporting his 1948 income listed the capital gain received upon the dissolution of Midway Peerless Oil Company on Schedule D of Form 1040 (R. 27), and, in addition, on the face of Schedule D referred to an attached schedule (A) (R. 27). On Note A attached to Schedule D, the appellants itemized the total assets distributed by Midway Peerless Oil Company and reported the appraised value of the assets distributed (R. 29). On this same Note A immediately under the description of the assets distributed, the ap-

pellants explained their method of reporting the value of the lease as follows (R. 30):

“Item 1—Lease is not readily marketable and has no ascertainable market value. Based upon the decision *Agnes F. Smith, Plaintiff, v. Harry C. Westover, Defendant*, 48-2, U.S.T.C. par. 9351, affirmed by the United States Court of Appeals for the Ninth Circuit, 173 Fed.2d 91 based upon the decision of the Supreme Court of the United States in *Burnet v. Logan* (X-1 CB 345), future payments will be returned as capital gains if and when received.”

Immediately below the explanation concerning Item 1, the taxpayer computed the value received during 1948 by appellant, Arthur L. Lawrence. Taking the items taxpayer had received, with the exception of the lease which had been previously explained, he subtracted therefrom the basis of the stock to arrive at a realized long-term gain for calendar year 1948 (R. 30). Taxpayer then took the figures for total value received and for basis of stock and inserted these figures in the proper columns on the face of Schedule D (R. 27). Taxpayer then combined these figures with the other capital gains and losses received by the taxpayer on Schedule D, computed the amount of long-term capital gain to be taken into account on page 2 of the tax return (R. 19), and entered that amount in computing taxpayer's total receipts on page 1 of the Federal Income Tax Return (R. 18).

The figures reported by the taxpayer on Schedule D, Note A (R. 29-30), agree with the figures used by the respondent Commissioner in his Notice of Deficiency, with the exception that taxpayer listed the value of the

A. L. Lawrence distributive share of the oil lease at \$19,484.15 whereas the respondent Commissioner listed this value at \$20,104.18 (R. 33). The respondent Commissioner's assessment of deficiency was based on respondent's determination that the interest of appellant in the lease distributed to him had an ascertainable fair market value (R. 31-34).

The only issue decided by the Tax Court and here to be reviewed by this court is the applicability of §275(c) of the Internal Revenue Code of 1939, as amended, to extend the normal three-year statute of limitations to five years.

SPECIFICATION OF ERRORS

Appellants rely upon the following errors of the court below:

1. The Tax Court erred in entering judgment for the respondent Commissioner of Internal Revenue in Cause No. 53929 in that such decree is not supported by its findings of fact.

2. The Tax Court erred in deciding that on its findings of fact the proposed federal income tax deficiency against appellants for the year 1948 was not barred by §275(a) of Internal Revenue Code of 1939, as amended, for the reason that the period of limitations was not extended by §275(c) of said code.

3. The Tax Court erred in refusing to follow the previous decisions of the United States Court of Appeals for the Ninth Circuit where it was held that the extension of the statute of limitations from three to five years pursuant to §275(c) of Internal Revenue

Code of 1939, as amended, does not apply where taxpayer makes a full disclosure of income on his return and takes into account all of his gross receipts in computing his federal income tax.

4. The Tax Court erred in failing to enter a decision that there was no deficiency in federal income tax due from appellants for the calendar year 1948.

SUMMARY OF ARGUMENT

The deficiency of taxpayers for 1948 is barred by the statute of limitations, since the Notice of Deficiency was mailed more than four years from the date on which taxpayers' return was filed and the five-year period of limitations expressed in §275(c) of Internal Revenue Code of 1939, as amended, does not apply. The taxpayers made a full disclosure of all income and gross receipts received by taxpayers and a full explanation of the legal principles involved in their method of reporting. The legislative history of §275(c) shows that Congress did not intend it to apply in the case where taxpayer fully reported the gross income amounts received and used said amounts in the computations and summarizations required by the Federal Income Tax Return forms supplied by the Commissioner.

All of the appellate courts recently reviewing the situation where a taxpayer fully reports his gross income but differs from the Commissioner in the legal application of the income tax to these receipts, have held that §275(c) is not applicable. The position of the taxpayer is also supported by the most recent pro-

nouncements on the subject from the Court of Claims and by the district courts which have considered the matter.

The Tax Court should follow a controlling decision of the circuit to which the appeal of the taxpayer will lie. The Courts of Appeal reviewing Tax Court decisions which have ignored the controlling decisions of said courts have uniformly held that the Tax Court should follow the controlling decision of the appellate court to which taxpayer's appeal will lie.

ARGUMENT

I. The Facts Establish That the Taxpayer Did Not Omit from Gross Income an Amount Properly Includible Therein in Excess of 25% of the Amount of Gross Income Stated in the Return

The question involved in this case is a very simple and direct one. Did appellant *omit* from his statement of gross income contained in his return more than 25% of his gross income?

A. Burden of proof of omission is on the Commissioner.

The respondent Commissioner in this case must establish this omission because respondent Commissioner delayed in assessing the deficiency until nearly five years after the filing of appellants' return, and unless Commissioner can establish a five-year exception to the statute of limitations the assessment of deficiency is barred by §275(a) of Internal Revenue Code of 1939, as amended.

The burden of proving that the statute of limita-

tions should be extended is upon the respondent Commissioner. As stated in *C. A. Reis v. Commissioner*, 1 T.C. 9, 12, affirmed *sub silentio*, 142 F.2d 902 (6th Cir.):

“The board has held many times in accord with general law 37 C.J. 124, that, where the respondent relies upon an exception to a statute of limitation he has the burden of proving facts to establish such exceptions. (Citations omitted.) In general, therefore, the respondent has the burden of proof of establishing an exception to the three-year limitation.”

B. The taxpayers did not omit 25% of their gross receipts.

§275(c) of Internal Revenue Code of 1939, as amended, uses clear language. It is entitled “*Omission from Gross Income.*” The word “omit” is the key word in this section and is decisive of its meaning and intent. There is nothing devious, mysterious or ambiguous about the word “omit.” Webster’s New International Dictionary (Second Edition Unabridged—1950) defines “omit” as:

“To leave out or unmentioned; not to insert, include, or name.”

Funk & Wagnall’s New “Standard” Dictionary of the English language (Standard Edition 1947) defines “omit” as:

“To fail to include, insert, or mention; leave out, pass over; overlook; drop; as to *omit* an important fact.”

This is the only meaning of the word “omit.” This word has been considered many times by the court, not because of its meaning so much as its application to

various circumstances by the Commissioner. In the case of *Ewald v. Commissioner*, 141 F.2d 750, 752 (C.C.A. 6), the court defines "omit" as meaning "disregard, to fail, forbear, neglect to mention, or fail to insert or include." See also cases cited in footnote 1, page 67, of *Slaff v. Commissioner of Internal Revenue*, 220 F.2d 65 (9th Cir. 1955). In using the word "omit," Congress was not attempting to write into the statute some obscure or unknown meaning, nor was Congress attempting to merely set up some type of mathematical formula for the extending of the normal statute of limitations from three to five years. As will be pointed out hereafter, Congress was undoubtedly attempting to extend the statute of limitations to those cases where the taxpayer "failed to disclose in his return" or where a taxpayer was "so negligent as to leave out." See Preliminary Report of Subcommittee of Committee on Ways and Means, 73rd Congress, Second Session, p. 21.

It is true, as stated in the Tax Court opinion in this case, that the Tax Court has consistently applied the five-year period of limitations regardless of how honest the mistake and regardless of the possibility that somewhere in the return or papers attached to it information was given to the Commissioner concerning the transaction giving rise to the omitted income (see Tax Court Opinion, R. 40). It is equally as true that not one of the courts of appeal which have recently been called upon to review the Tax Court on this matter have supported the Tax Court. These courts have taken the position that the word "omit" as used in the statute means the taxpayer must have failed to include the

matter in the computation of his income in order for it to constitute an omission.

The appellants urge that the decision of the Tax Court is incorrect wherein it is stated that taxpayers made a computation of their income and "omitted from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the return" (R. 40). When an examination is made of the appellants' 1948 Federal Income Tax Return 1040 (R. 18-30), it can readily be seen that there is no one place on the Federal Income Tax Return where a figure representing gross income can be inserted. The figure used for adjusted gross income on page 3 of the return which is used in the computation of net income, is the composite figure carried over from Item 6, page 1. This figure of adjusted gross income is composed of the total amount of wages, salaries, bonuses, commissions and other compensation and the total amount of dividends and interest, together with an adjusted amount of income from sources such as capital gains, or a business or other sources, which is computed and correlated on page 2 of the tax return (R. 18-19). Page 2 contains columns for insertion of figures from Schedules C and D, which are figures obtained as a result of computations made on those schedules. The appellants in this case, as shown by Note A and Schedule D of their return (R. 27-31), reported gross income on Schedule D in the only manner possible to report income from the type of interest that they were reporting. The Tax Court itself has recognized that there is no one place for gross income in a very similar tax case involving Schedule E of a 1945

tax return. In *Van Bergh v. Commissioner*, 18 T.C. 518, at p. 521, the court stated:

“Curiously enough, there is no item on the Individual Income Tax Return Form expressed as indicating ‘gross income.’ It cannot hence be argued that the mere failure to insert the figure at any designated place in the return constitutes its omission from ‘gross income.’ Line 5 of the return at which point the total of the income items appears is characterized on page 3 of the return as ‘Adjusted Gross Income.’ A reference to §22(n), Internal Revenue Code, demonstrates that gross income and adjusted gross income are not the same.”

The Tax Court, in the *Van Bergh* case, *supra*, held that a petitioner availing himself of the benefits of §107 of the Internal Revenue Code of 1939, as amended, did not omit from gross income any part of the compensation affected by entering the amounts received on Schedule E, and therefore held that the three-year statute of limitations and not the five-year statute of limitations applied.

The appellant in this case has not omitted from gross income any amounts, as shown by Schedule D and Note A of his 1948 Federal Income Tax Return (R. 27-31). The taxpayer made a full disclosure and took into account income from all sources in completing his tax return in the only manner possible without abandoning his clearly revealed legal position. As stated by this Court of Appeals in the case of *Slaff v. Commissioner*, 220 F.2d 65 (9th Cir. 1955) at page 68:

“How such a plain statement can be construed as an omission is difficult for us to understand

under the circumstances. We feel that under the many and varied applications of §275(c) Internal Revenue Code, there were no omissions in the case at bar, and find no occasion to further torture the meaning of the word 'omit'."

II. A. Legislative History Establishes that Congress Intended the Word "Omission" to Apply to a Failure to Disclose Receipts

The provision of the statute which eventually became §275(c) originated in a subcommittee of the Ways and Means Committee of the House of Representatives of the 73d Congress. The subcommittee originally proposed that failure of taxpayers to disclose large amounts of gross income should subject such taxpayers to a complete suspension of the statute of limitations and that a change should be written into what was then §276 relating to fraud and failure to file returns stating that large omissions from gross income were to carry no period of limitation on assessment. In proposing such an additional provision, the subcommittee said in part as follows:

"Your subcommittee is of the opinion that the limitation period on assessments should also not apply to certain cases where the taxpayer has understated his gross income on his return by a large amount, even though fraud with intent to evade tax cannot be established. It is, therefore, recommended that the statute of limitations shall not apply where the taxpayer has failed to disclose in his return an amount of gross income in excess of 25% of the amount of the gross income stated in the return. The Government should not be penalized when a taxpayer is so negligent as to leave

out items of such magnitude from his return." Preliminary Report of The Subcommittee of the Committee on Ways and Means, 73d Congress, 2d Session, p. 21. (Dec. 4, 1933)

Prior to a hearing before the full committee, the acting Secretary of the Treasury, Henry Morgenthau, Jr., issued a statement regarding the preliminary report of the subcommittee, stating at page 17:

"(27) *Understatement of gross income.* The Treasury is of the opinion that such a provision would cause considerable confusion in the closing of cases and would result in widespread uncertainty as to when a tax liability is or is not closed by the running of the statute of limitations." (Statement of the Acting Secretary of the Treasury, on Preliminary Report 73rd Cong. 2nd Session, p. 17)

The provision concerning this section was reported out of the House of Representatives as follows:

"§276(a). No return or false return: The present law permits the government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return. The change in this section continues this policy, but enlarges the scope of this provision to include cases wherein the taxpayer understates gross income on his return by an amount which is in excess of 25% of the gross income stated in the return. It is not believed that taxpayers who are so negligent as to leave out of their return items of such magnitude should be accorded the privilege of pleading the bar of the statute." (House Report No. 704, accompanying H.R. 7835, 73d Congress, 2d Session, p. 35)

From the above statements, it is obvious that the House Committee and its subcommittee were attempting to extend the statute of limitations in those cases where the taxpayer failed to disclose a receipt of substantial size even though fraudulent intent could not be established.

The Treasury Department representatives and the Congressmen discussing this matter before the subcommittee clearly indicated that this provision was directed at those taxpayers who did not report their gross receipts. In testimony before the House Ways and Means Committee, the following individuals made this purpose clear (See House Hearings on Revenue Revisions before the Committee on Ways and Means, 73d Congress, 2d Session, at p. 149).

Mr. Roswell Magill of the Treasury Department stated:

“The Subcommittee suggestion there is that in the event a taxpayer does not disclose in his return an amount in excess of 25% of the gross income which he states in his return, that there should be no Statute of Limitations upon it; and the argument is that when a taxpayer has been negligent to that extent it is fair to assess the tax against him at any time * * *

“We have a recommendation which would, I believe, operate to get at the same thing in a little different way—that a taxpayer, to be required to file returns when his gross receipts are \$10,000.00 or over; and with the consequence that if he does not, then he could be assessed at any time.”

In the discussion with Roswell Magill, Congressman Jere Cooper of the Subcommittee said (House Hear-

ings on Revenue Revisions before the Committee on Ways and Means, 73d Congress, 2d Session, at p. 149):

“COOPER: What we really had in mind was just this kind of a situation: Assume that a taxpayer left out, say, a million dollars; he just forgot it. We felt that whenever we found that he did that we ought to get the money on it, the tax on it.

MAGILL: I will not argue against you on that score.

COOPER: In other words, if a man is so negligent and so forgetful, or whatever the reason is, that he overlooks an item amounting to as much as 25% of his gross income, then we simply ought to have the opportunity of getting the tax on that amount of money.”

And shortly thereafter the following occurred (House Hearings, *Supra*, p. 154):

“CONGRESSMAN SAMUEL B. HILL:

“Now this matter of the Statute of Limitations not running against an item exceeding 25% of the gross income of the taxpayer, contemplates, of course, that there has been a return made, but he simply omitted from that return a certain large part of his income?

MR. MAGILL: That is true * * *.”

After the bill was reported from the House, it was considered by the Senate and reported out of the Senate as follows.

“The present law permits the government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return. The House Bill continues this policy, but enlarges the scope of this provision to include cases wherein the taxpayer understates

gross income on his return by an amount which is in excess of 25% of the gross income stated in the return. Your committee is in general accord with the policy expressed in this section of the House Bill. However, it is believed that in case of a taxpayer who makes an honest mistake, it would be unfair to keep the statute open indefinitely. For instance, a case might arise where taxpayer failed to report a dividend because he was erroneously advised by the officers of the corporation that it was paid out of capital or he might report as income for one year an item of income which properly belonged in another year. Accordingly your committee has provided for a five-year statute of limitation in such cases. This amendment also necessitates a change in §276(a) of the bill." (Senate Report No. 558 to accompany H.R. 7835, 73d Congress, 2d Session, pp. 43-44)

This matter was then referred to conference, and House of Representatives conference report No. 1385 to accompany H.R. 7835 of the 73d Congress, 2d Session, at p. 25, stated as follows:

"Amendments Nos. 117 and 121: The House Bill provided that there should be no statute of limitations in case the taxpayer omits from gross income an amount properly includible therein which is in excess of 25% of the gross income stated in the return. Amendment No. 121 strikes out this provision and amendment No. 117 substitutes a period of limitation of five years after the filing of the return. The House recedes."

From an analysis of the above legislative history, it is clear that Congress unmistakably was limiting the scope of this section to the situation of "leaving out," "failing to mention," or "not naming." The basic test

was negligence of the taxpayer in omitting to report items of income, and there is not the slightest indication that Congress intended that the exception it was creating should apply to the situation where the taxpayer fully stated each and every item of his total income and then used the items reported to compute his net taxable income.

II. B. Section 6501(e)(1)(A) of Internal Revenue Code of 1954 Did Not Make a Change in the Law with Regard to "Omissions"

The Tax Court in its opinion (R. 41-43) states that §6501(e)(1)(A)(ii) of the Internal Revenue Code of 1954 supports the view consistently taken by the Tax Court regarding Sec. 275(c) of the Internal Revenue Code of 1939, and further states that the Ninth Circuit in *Slaff v. Commissioner*, 220 F.2d 65, 67 (9th Cir. 1955) recognized that the 1954 legislation changed the existing law. The Tax Court is incorrect in both instances in that the 1954 Revenue Code did not change the existing law nor did the Ninth Circuit so state.

A reference to the cases cited in Section III of this brief indicates that the existing law other than in the Tax Court had established that "omission" meant the failure of the taxpayer to disclose items of income in his return. The case at bar is a very good example of the reason for the passage of this section of the Internal Revenue Code of 1954. The Commissioner had consistently refused to follow the mandate of the various Courts of Appeal, the Court of Claims, and various District Courts in the plain use of the word "omit," and the Tax Court had consistently sustained the Com-

missioner's position even though faced with controlling contrary decisions in the Appellate Courts. The taxpayers had consistently prevailed in the Courts of Appeal and the Commissioner did not appeal these decisions to the Supreme Court, which meant that in each case the Commissioner could force the taxpayer to litigate through the Court of Appeals with the consequent loss of time and expense before the taxpayer could take advantage of the established law of the Circuit. It is little wonder that Congress determined that a clarifying statutory change should be made in the wording of the section to protect taxpayers from this situation.

An examination of Sec. 6501 of Internal Revenue Code of 1954 sustains the above argument. Sec. 6501 first states the general rule applying to omission from gross income in language identical to that of former §275 except for using the more commonly used "percent" in place of "per centum." The section then extends the assessment period from five years to six, and for purposes of clarifying the general rule two subparagraphs entitled (i) and (ii) are added. These subparagraphs are not added as a proviso but are solely for the purpose of clarifying the terms used in the general rule which was not changed.

In defining "omission," section (ii) defines an omission as follows:

"In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in a return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or

his delegates of the nature and amount of such item.”

This court of appeals in the case of *Slaff v. Commissioner*, 220 F.2d 65 (9th Cir. 1955) did not state that this section “changed” the existing law but rather that the problem was solved for those cases arising in the future. This is indicated by the court’s language on page 67 as follows:

“The word ‘omit’ has been the source of much litigation. While the meaning of the word has not been in dispute, its application to various circumstances by the Commissioner has created much litigation as well as confusion over said Section 75(c), Internal Revenue Code.

“Congress in the Revenue Code of 1954, 26 U.S.C.A., has solved this problem for our guidance in the future when it stated in Section 6501(e) in part as follows:” (Citation of statute omitted.)

III. All of the Courts of Appeal, the District Courts and the Court of Claims Which Have Recently Considered This Matter Have Held That §275(c) Is Not Applicable in Cases Where Taxpayer Has Made Full Disclosure of All of His Receipts in His Return

The following courts have recently considered this matter and have held that, when a taxpayer has made a full disclosure in his return of the items of his gross income and has used said items in computing his tax, there is no omission under §275(c):

Uptegrove Lumber Company v. Commissioner, 204 F.2d 570 (3rd Cir. 1953); *Deakman-Wells Company, Inc. v. Commissioner*, 213 F.2d 884 (3rd Cir. 1954); *Davis v. Hightower*, 230 F.2d 549 (5th Cir. 1956);

Goodenow v. Commissioner, 238 F.2d 20 (8th Cir. 1956); *Slaff v. Commissioner*, 220 F.2d 65 (9th Cir. 1955); *Lazarus v. U.S.*, 142 F.Supp. 897 (Ct. Cl. 1956); *Hommes v. Riddell*, 1956 P-H Fed. Tax Rep. ¶ 72, 530 (D.C. Cal.).

We rely in particular on the Court of Appeals for the Ninth Circuit clear and precise holding in *Slaff v. Commissioner*, 220 F.2d 65 (9th Cir. 1955). The taxpayer in the *Slaff* case reported his income from his employment as an agent of the American Red Cross but claimed the entire amount exempt under §168 of the Internal Revenue Code. Following its usual mathematical determination just as was done in the case at bar, the Tax Court held that the taxpayer had omitted from gross income an amount in excess of 25% of his gross income and assessment was therefore possible after the expiration of the three-year statute of limitations.

Both the Tax Court and the Court of Appeals determined that the taxpayer was wrong on the merits, so this Court of Appeals concerned itself entirely with the question of the statute of limitations.

This court phrased the question in *Slaff v. Commissioner, supra*, at page 68, as follows:

“Shall a taxpayer who makes full disclosure on the face of his return but is passed by the Collector of Internal Revenue until the three-year statute of limitations has run, suffer a deficiency at the hands of the Commissioner because it has been overlooked?”

The court answered this question as follows:

“We are of the view that if there are any omissions they were not on the part of the taxpayer but

of those who handled the returns after they were filed." . . .

In the case of *Uptegrove Lumber Company v. Commr.*, 204 F.2d 570 (3rd Cir. 1950), the taxpayer reported a correct statement of its gross sales. From its gross sales it then subtracted an amount designated as "the cost of goods sold." This "cost" was an aggregate of items including a reserve for retroactive wage increases pursuant to demands then pending before the National War Labor Board but later disallowed. At the time of the hearing there was no question but that the "cost of goods sold" could not lawfully include this contingent reserve fund. This error was carried forward, resulting in an incorrect gross profit from sales, and an end result of an understatement of taxable income by more than 25%. The question before the Court of Appeals for the Third Circuit as it was seen by that court, was as follows:

"The Commissioner and the Tax Court say that the language 'omits from gross income any amount properly includible therein' should be construed broadly as if it read 'understates the final figure in his gross income computation.' The taxpayer says the words of the statute are to be taken as if they read 'omits from his computation of gross income an item or items of taxable gain.' We must decide which is the correct construction of the statute."
(Page 571)

The Court of Appeals for the Third Circuit, after discussing the question further, says:

" * * * And once the appropriateness of resort to legislative history is established, we think the history of Section 275(c) persuasively indicates

that Congress was addressing itself particularly to the situation where a taxpayer shall fail to include some receipt or accrual in his computation of gross income and not in a more general way to errors of whatever kind in that computation." (Page 572)

To substantiate this conclusion, the Appellate Court goes on to cite and discuss basically the same materials cited earlier in this brief with regard to legislative history.

The Court of Appeals for the Third Circuit concluded this section of its opinion as follows:

" * * * In these circumstances we think it was the manifest purpose of Congress to make an exception to the three-year statute of limitations which would apply only to situations where the taxpayer had failed to make a return of some taxable gain.

"And this restriction is quite logical. For there are many places throughout an income tax return where a taxpayer may make arithmetical errors or claim improper deductions with the result that his tax liability is understated. If such errors are made in good faith at any place other than the gross income section, it is clear that the government must challenge them, if at all, within the normal three-year limitation period. No reason appears or has been suggested why Congress would wish to allow a longer time to discover errors of the same type in the gross income section of the return. Yet this would be the strange result of the construction which the Commissioner would give to Section 275(c)." (Page 572)

In *Deakman-Wells Company v. Commissioner of Internal Revenue*, 213 F.2d 894 (3rd Cir. 1954) the

third circuit applied the same reasoning of the *Uptegrove* case, *supra*, to a slightly different fact situation. In the *Deakman-Wells* case the conflict was over whether the taxpayer should have reported its income on an accrual or on a cash basis, the taxpayer choosing the latter whereas he should have chosen the former. The cash method of reporting resulted in a gross profit of approximately one-half what it would be if computed on the accrual method. The taxpayer in the *Deakman-Wells* case computed his gross profit on a schedule entitled "Statement of Operations — Fiscal Year Ended April 30, 1947" which was attached to the inside portion of the return, and only the final figure appeared on Page 1 of the return.

The Commissioner attempted to distinguish the *Deakman-Wells* case from the previous *Uptegrove* case in the same Circuit because of the use of the supplemental schedule in disclosing the taxpayer's gross profit. The Court of Appeals for the Third Circuit in the *Deakman-Wells* case refused to make such a distinction, holding instead the statute did not apply merely because of an understatement of the final figure in the gross income computation and stated with regard to the method chosen by the taxpayer to disclose his income, the following:

" * * * It can scarcely be expected that every taxpayer's business will be such that the form supplied by the Commissioner can always be followed in computing gross income. It is accordingly sufficient if all items of gross income are disclosed in a schedule attached to the return in which the computation is made." (Page 897)

In the case at bar, the taxpayers made a very complete disclosure of the total value received as a result of the distribution and complete liquidation. These figures were taken and used by the taxpayer in the income computation but were subjected to certain reductions, the same being clearly indicated as a part of the computations. This must have been readily seen when examined by the government, as shown by the fact that, with one exception, the taxpayers' figures were used by the respondent Commissioner in computing the alleged deficiency.

IV. The Tax Court Should Follow the Law of the Circuit

The Tax Court has taken the unfortunate position that it need not follow a decision of the various Circuit Courts even where the appeal in a particular case will lie to a Circuit with a clear holding in support of the taxpayer's situation (R. 43-50). The position as taken by the Tax Court leads to an inevitable result of confusion, uncertainty and lack of uniformity, with the result that the Tax Court loses the influence and respect it should have, and taxpayers such as the petitioners in this case are forced into expensive litigation over small amounts to obtain justice.

The previous opinion of this court in *Slaff v. Commissioner, supra*, is the law of this Circuit so far as the construction of Sec. 275(c) is concerned. This decision is binding upon all the courts at the trial level within this Circuit and has been followed by said courts, as may be seen with reference to the District Court decision in *Hommel v. Riddell*, 1956 P-H Fed. Tax. Rep. Par. 72,530 (D.C. Cal.).

Concerning the necessity of following the opinion of the Ninth Circuit in the *Slaff* case, *supra*, the Tax Court made the following statement:

“If the views of the Court of Appeals for the Ninth Circuit are the same as those of the Court of Appeals for the Third Circuit there is no difficulty here, but, if it does not so distinguish this case from its *Slaff* case, then even so the Tax Court must respectfully adhere to its own views in this case.” (R. 43)

The Tax Court has, on past occasions, refused to follow the opinion of a Circuit Court which has overruled a previous Tax Court decision on the same legal issues, and the Appellate Courts have properly overruled the Tax Court in this matter.

This situation faced the Tax Court in *Stacey Manufacturing Company v. Commissioner of Internal Revenue*, 24 T.C. 703, the Sixth Circuit having previously reversed the Tax Court on the same legal issue in *Owensboro Wagon Company v. Commissioner*, 209 F. 2d 617 (6th Cir. 1954). In spite of this, the Tax Court handed down the same legal conclusion that it had been reversed on in the *Owensboro Wagon* case. The 6th Circuit in *Stacey Manufacturing Co. v. Commr.*, 237 F.2d 605 (6th Cir. 1956) reversed the Tax Court and, with regard to the Tax Court's refusal to follow the previous decision of that court, said at page 606:

“The situation developed in these cases requires the expression of our considered opinion that the Tax Court of the United States is not lawfully privileged to disregard and refuse to follow, as the settled law of the circuit, an opinion of the court of appeals for that circuit. If the tax court is not

bound on questions of law by decisions of the appropriate circuit having jurisdiction, why should any jurisdiction be vested in circuit courts of appeals to review decisions of the tax court? The district courts of the several circuits also have statutory jurisdiction in tax cases and they are bound to follow the rules of decision pronounced by the United States Court of Appeals having appellate jurisdiction over the particular district court. The tax court is no less bound to do so. The mere fact that it is a court having jurisdiction in tax cases throughout the United States does not establish the tax court as superior in any aspect to United States District Courts.

“The desire of the tax court to establish by its decisions a uniform rule does not empower it to disregard the decisions of its several reviewing courts of appeals. It is for the Supreme Court of the United States—and for that tribunal alone—to review and reverse decisions of the courts of appeals of the United States in their respective jurisdictions. Until the Supreme Court reverses a rule by a court of appeals for its circuit, that rule must be followed by the tax court.”

In this connection see also *Stern v. Commr.*, 242 F.2d 322 (6th Cir. 1957).

The Seventh Circuit has also considered the position taken by the Tax Court in refusing to follow a previous opinion of that circuit. In *Sullivan v. Commissioner of Internal Revenue*, 241 F.2d 46 (7th Cir. 1957) the same legal issue had previously been decided by the Seventh Circuit, but, nevertheless, the Tax Court, following its stated policy, refused to follow that decision. The Seventh Circuit, like the Sixth Circuit, stated its disap-

proval of the position taken by the Tax Court in refusing to follow its previous decisions and said at page 47:

“ * * * If the Commissioner feels that the decision in the *Doyle* case was wrong, he should have, by application for certiorari, afforded the Supreme Court an opportunity to pass upon his contentions. Lacking such a decision by the highest court, a decision by one judge of the Tax Court, which, in effect, overrules a decision of the court of appeals in the circuit in which both cases arose, is not consonant with the responsibilities of the respective tribunals involved.”

The Tax Court considers that it is necessary in the interests of uniformity that it continue to decide cases without regard to reversing opinions of the various Circuit Courts. Contrary to the above intention to create uniformity, the Tax Court's position, in fact, creates disunity. Of all the courts hearing and deciding questions concerning the legal interpretation to be applied to §275(c), only the Tax Court continues to apply the straight mathematical computation consistently used by it. The Circuit Courts have a natural tendency to coordinate and comply with the decisions of fellow Circuit Courts wherever possible. This may be seen by reference to *Goodenow v. Commissioner of Internal Revenue*, 238 F.2d 20 (8th Cir. 1956). The Tax Court in 25 T.C. 1 had held that the taxpayer omitted more than 25% from gross income because his final figure concerning capital gain on the sale of some cattle was understated by more than 25%, caused by the overstatement of a cost figure. The Eighth Circuit was of the opinion that this item was sufficiently evident from the taxpayer's return and discussed the opinions of

the Circuit Courts in *Uptegrove Lumber Company v. Commissioner, supra*; *Deakman-Wells Company, Inc. v. Commissioner, supra*; *Slaff v. Commissioner, supra*; *Davis v. Hightower, supra*; and then said:

“This court has repeatedly ruled, particularly in tax cases, where uniformity of decision among the Circuits is vitally important, that the decision of a Court of Appeals of another Circuit should be followed unless demonstrably erroneous or unsound.” (Page 22)

The Tax Court’s refusal to follow the considered opinions of the various Circuit Courts foments litigation and causes inconvenience and oppression of taxpayers, forcing them to take the additional expense of a Circuit Court appeal even though the law of the Circuit is well established.

CONCLUSION

We submit the Tax Court’s decision is erroneous in Cause No. 53929 and that the decision should be reversed with respect to the deficiency in the amount of \$2,931.14, and that taxpayers should receive from respondent the sum of \$4,162.22 paid by taxpayers plus 6% interest on \$4,162.22 from the 1st day of March, 1957, to date, and further that appellants should be awarded their costs.

Respectfully submitted,

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In the United States Court of Appeals
for the Ninth Circuit

ARTHUR L. LAWRENCE AND ALMA P. LAWRENCE,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,532

ARTHUR L. LAWRENCE AND ALMA P. LAWRENCE,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 35-50 is reported at 27 T. C. 713.

JURISDICTION

This petition for review (R. 52-53 involves income tax for the year 1948 in the amount of \$2,931.14. On May 10, 1954, the Commissioner of Internal Revenue mailed to taxpayers a notice of deficiency in the amount of \$2,931.14. (R. 9-12.) On July 22, 1954 (R. 12), taxpayers filed a petition (R. 3-12)

with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939. The decision of the Tax Court was entered on January 31, 1957. (R. 51.) The case is brought to this Court by petition for review filed March 20, 1957. (R. 52-53.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether taxpayers omitted from gross income an amount properly includible therein in excess of 25 per centum of the amount of gross income stated in the return, so as to bring into play the five-year statute of limitations of Section 275(c) of the Internal Revenue Code of 1939.

2. Whether the Tax Court erred in holding that even if a prior decision of this Court is indistinguishable, it is not controlling upon the Tax Court.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(c) *Omission from Gross Income.*—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

* * * *

(26 U.S.C. 1952 ed., Sec. 275.)

STATEMENT

The facts, as stipulated (R. 16-34) and adopted as the findings of fact of the Tax Court (R. 36), may be summarized as follows:

Taxpayers filed a joint income tax return for the calendar year 1948 on May 31, 1949. (R. 16.) On May 10, 1954, more than three but less than five years thereafter, the Commissioner mailed a notice of deficiency in income tax in the amount of \$2,-931.14. The only question presented to the Tax Court was of the applicability of the statute of limitations. (R. 17.)

Taxpayer Athur L. Lawrence was a stockholder of the Midway Peerless Oil Company. This company was dissolved and its assets distributed to its stockholders in complete liquidation in 1948. (R. 17.) Among the assets distributed were a lease, leasehold equipment, buildings, inventories, and cash and other assets. (R. 29.)

Schedule D of taxpayers' return for 1948 showed a gross sales price for assets received from Midway Peerless Oil Company of \$10,539.71, and a basis for

the stock of \$1,899.90, the gain being treated as long-term capital gain. (R. 27.) The gross price reflected the value of the items received other than the lease and inventory. The value of the lease and inventory were not included in Schedule D because taxpayers claimed that they had no ascertainable market value. (R. 30.) The Commissioner determined that the lease had a fair market value of \$20,104.18 and the inventories a fair market value totaling \$89.18. (R. 33.) The deficiency of \$2,931.14 arose from a recomputation of taxpayers' income for 1948, including those items.

There is no dispute as to the amount of the deficiency, as to the value of the lease, or as to the fact that the amount of \$20,104.18 plus \$89.18, or even the taxable one-half of that amount, meets the 25 per cent requirement of Section 275(c) of the Internal Revenue Code of 1939. (R. 17, 36-37.)

Taxpayers' return appears in the record. It is on Form 1040 (R. 18-19) which contains a "Schedule D—Gains and Losses from Sales or Exchanges of Capital Assets, etc." showing the amount of \$4,491.78 (R. 19). A separately itemized Schedule D (R. 27) includes among other long-term gains and losses an item for Midway-Peerless Oil Company, showing a gross sales price of \$10,539.71 and a cost or other basis of "(A) \$1,899.90." A separate typed sheet, headed "Schedule D—Note A" (R. 29-30) and also headed "Computation of Gain on Liquidation of Midway Peerless Oil Company" contains a schedule of the value of assets distributed, an explanation that the lease had no ascertainable market value and

that the inventories were part of the lease, and a "Computation of Value Received During 1948 by Arthur L. Lawrence." This latter listed the value of the cash received, leasehold equipment, and buildings, set out the total value received as \$10,539.71, the basis of the stock as \$1,899.90, and the realized long-term gain as \$8,639.81.

The Tax Court held that "It is obvious from the entire return that the taxpayers made a computation of their income and omitted 'from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return' " (R. 40) and accordingly that the notice of deficiency was timely.

SUMMARY OF ARGUMENT

I

The income derived by taxpayers from the distribution to them of an interest in the lease was omitted from their gross income under the clear language of the statute. Although receipt of a lease interest was set out in a schedule attached to the return, it was nowhere reported as *income* nor does it appear in any of the computations of income.

Unless it is to be held that disclosure somewhere in the return of the receipt of property later determined to be income is sufficient, then Section 275(c) is clearly applicable. None of the decisions of this or other Courts of Appeals goes so far. On the contrary under the decisions of this Court the amount was omitted from gross income. The Tax Court's decision is in accord with those of the Second and

Sixth Circuits and not in conflict with those of the other circuits. It is also supported by the legislative history of Section 275(c) and by congressional statements of its intention to change the law by Section 6501(e) of the Internal Revenue Code of 1954.

II

In reaching its decision the Tax Court did not disregard a controlling decision of this Court. On the contrary, it decided an issue at the very least left open by earlier decisions of this Court. Even if there were a decision of this Court squarely in point, however, the Tax Court, for the reasons set out in its opinion, did not err in deciding this case on the basis of its view of the correct application of the statute.

ARGUMENT

I

The Tax Court Correctly Held That Taxpayers Had Omitted 25 Per Cent of Their Gross Income Within the Meaning of Section 275(c) of the Internal Revenue Code of 1939

As the Tax Court points out, it is obvious that taxpayers did not include in their taxable income as shown on the return the item of income here in question. It is not reflected in Item 6 on page 1 of the return (R. 18); it is not reflected in the summary Schedule D on page 2 (R. 19); it is not included in the itemized Schedule D (R. 27); it is left out of the "Computation of Value Received During 1948" on the sheet attached to Schedule D (R. 30).

That sheet did show that Lawrence received some property, an interest in a lease, not included in his statement of income, but that item was deliberately excluded and omitted by him in each of the computations of his reportable income. He clearly “omits from gross income an amount properly includible therein,” and this amount is in excess of 25 per cent of “the amount of gross income stated in the return.” Section 275(c), Internal Revenue Code of 1939, *supra*. He did report that he received the lease interest, but not that he received it as income. Taxpayers’ argument is in substance that an amount which they deliberately, though mistakenly and in good faith, omitted from their statements of income, was nevertheless not omitted from income because the receipt of the amount was disclosed.

In all of the computations purporting to show taxpayers’ *income* this amount is omitted. In this respect this case is clearly distinguishable from *Slaff v. Commissioner*, 220 F. 2d 65 (C. A. 9th). There the taxpayer stated on the first page of his return, under the heading “Income” the following (p. 66):

American Red Cross—Overseas Sept. 1942 to Dec. 1944. Income received \$3,300; exempt under Section 116 I.R.C.; therefore no taxable income.

This Court held that there was in those circumstances no omission because there had been “full disclosure on the face of the return.” There, however, the taxpayer did report the \$3,300 *as income*, and made full disclosure that it was income. Here the taxpayers did not.

Taxpayer here did not even go as far as the taxpayer did in *O'Bryan v. Commissioner*, 148 F. 2d 456 (C. A. 9th), in reporting gross income on the face of the return. There the taxpayer, because of the terms of a separation agreement with his wife, was taxable on his entire income. He paid taxes on only one-half on a return filed in his own name, and taxes on the other half on a return filed by him in his wife's name. On his return for 1936 was reported under the general heading of "Income," Item 1, salaries, wages, commissions, fees, etc. as follows:

| | | <u>Amount Received</u> | <u>Expenses Paid</u> |
|---------------------|---|----------------------------|--------------------------|
| | (| | |
| O'Bryan Bros., Inc. | (| \$10,250 | \$1,029.50 |
| | (| 20,500 | 2,059.00 |

In the column opposite Item 1 the difference between the amount received and the expenses paid, or \$9,220.50, is shown. The "Total Income in Items 1 to 11" is shown as \$9,591.50.¹ This Court rejected taxpayer's argument that there was no omission because the full amount of his income appeared on the face of the return, saying (pp. 459-460):

The mere appearance of the total amount of gross income somewhere on the face of an income tax return is not sufficient to prevent an omission within the terms of §275(c). The government is not required to search carefully throughout a tax return to ascertain some fact which will put it on notice of error. It is apparent

¹ See page 28 of the record in that case for a photograph of the return.

from the pertinent legislative history that care and good faith will not prevent the applicability of subsection (c).

In the present case, the taxpayers nowhere stated the full amount of their income as an item of income. In this respect, at least, they did not even do as much as was done by O'Bryan. Nevertheless that was held insufficient.

Taxpayers in their brief (pp. 20-25) do not refer to the *O'Bryan* case, but rely primarily on this Court's decision in the *Slaff* case and on two Third Circuit cases, *Uptegrove Lumber Co. v. Commissioner*, 204 F. 2d 570, and *Deakman-Wells Co. v. Commissioner*, 213 F. 2d 894, which this Court referred to with approval in *Slaff*, p. 68. This Court, in the *Slaff* case, referred to and distinguished, but did not indicate any disapproval of its earlier decision in the *O'Bryan* case, which we take to remain in force as a precedent for similar cases. We submit that the present case presents an omission from gross income much closer to the *O'Bryan* situation than to the *Slaff* situation.

Similarly, the Tax Court cited this Court's approval of *Uptegrove* and *Deakman-Wells* as evidence that in *Slaff* this Court was approving the views of the Third Circuit in a case like the present one. (R. 43.) As the Tax Court points out, the opinions in those cases indicate that the Third Circuit would hold in a case like the present one that there was an omission from gross income. In *Uptegrove v. Commissioner*, 204 F. 2d 570, 573, the court referred to three earlier

cases,² and said—

These cases all involved failures to enter certain items of gain in the gross income sections of returns. Each taxpayer relied upon the fact that somewhere else in his return, or in some statement attached to it, he had revealed the existence of the item in question though he did not report it as gain taxable to himself.

The court went on to say that even if there was disclosure and the intent of the statute was to offset the mischief of concealment—

the courts could not reach these policy considerations because the applicability of the language of the statute, “omits from gross income,” to the given facts was so clear.

There the court held that there is an omission “only when he leaves some item of gain out of his computation of gross income,” emphasizing “the character of gross income as a computation” (204 F. 2d 570, 571), and emphasized there and in *Deakman-Wells Co. v. Commissioner*, 213 F. 2d 894, 897, that there is no omission if the questioned item appears in the computation even if “eliminated in the computation of the final figure.” The rule of those cases, then, appears to be that a disclosure of an item somewhere in the return is not enough, but that the disclosure must be at some point in the computation itself. To the same effect are *Davis v. Hightower*, 230 F. 2d 549,

² *Ewald v. Commissioner*, 141 F. 2d 750 (C. A. 6th); *Ketcham v. Commissioner* 142 F. 2d 996 (C. A. 2d); and *O'Bryan v. Commissioner*, 148 F. 2d 456 (C. A. 9th).

553 (C. A. 5th), and *Goodenow v. Commissioner*, 238 F. 2d 20 (C. A. 8th). Though we submit that even in the situations involved in those cases the different result reached by the Sixth Circuit is preferable (*Colony, Inc. v. Commissioner*, 244 F. 2d 75, petition for certiorari filed, July 22, 1957; *Reis v. Commissioner*, 142 F. 2d 900), in any event the decision of the Tax Court in the present case is consistent with the rule announced by the Third Circuit and approved by this Court in the *Slaff* case.

Furthermore, although taxpayers cite recent cases in their brief (pp. 20-21), the earlier decisions on this problem remain outstanding. See, for example, *Ewald v. Commissioner*, 141 F. 2d 750 (C. A. 6th),³ where it was held that Section 275(c) was applicable although the omission was not negligent.

In *Carew v. Commissioner*, 215 F. 2d 58 (C. A. 6th), taxpayer had included in his statement of "Cost of Goods Sold" such items as "Alimony Settlement," thereby overstating the cost of goods sold and understating his gross profit. It was held that there was an omission even though on the information given the Commissioner could have revised the return.

Ketcham v. Commissioner, 142 F. 2d 996, 997 (C. A. 2d), is directly in point on the factual situation in the present case. There the question was whether certain income was taxable to a divorced wife or was alimony. It was held taxable to her and the five-year statute of limitations was applied, because she had

³ Cited with approval by this Court in the *O'Bryan* case.

omitted this income from her return. The court stated—

That she attached schedules to her returns, stating that she had received certain amounts as trust income in lieu of alimony, but that such amount was taxable to her husband, cannot relieve her from the effect of having omitted those amounts from her gross income.

To sum up the decisions, it appears that under those of the Second and Sixth Circuits disclosure of the receipt of income somewhere in the return is not sufficient to render Section 275(c) inapplicable; even under the decisions of the Third, Fifth, and Eighth Circuits a disclosure sufficient to cure the omission must appear in the computations of gross income and it is not enough if the disclosure appears elsewhere. Under the two decisions of this Court, the question appears to be an open one. In the *Slaff* case the disclosure appeared in the computation; in *O'Bryan*, the reference was in the computation, but was inadequate as a disclosure.⁴ We submit, however, that in the present case the disclosure did not appear in the computation of gross income, so that even under the rulings of the Third Circuit there was an omission from gross income, so there is "no relevant ambiguity in the statute to warrant the consideration of its purpose in order to discover its meaning." *Uptegrove Lumber Co. v. Commissioner*, 204 F. 2d 570, 573.

⁴ In the *O'Bryan* case this Court cited with approval the Second and Sixth Circuit cases, *Ewald v. Commissioner*, *supra*, *Reis v. Commissioner*, *supra*, and *Ketcham v. Commissioner*, *supra*. In the *Slaff* case it cited with approval the two Third Circuit decisions.

Taxpayers assert that the legislative history shows that "The basic test was negligence of the taxpayer in omitting to report items of income, * * *." (Br. 17-18.) It is clear, however, that the statute was not directed solely to cases of negligence. As this Court said in *O'Bryan v. Commissioner*, 148 F. 2d 456, 460:

It is apparent from the pertinent legislative history that care and good faith on the part of a taxpayer will not prevent the applicability of subsection (c).

The pertinent committee reports make this abundantly clear.

The provisions of subsection (c) of Section 275 first appeared in Section 275(c) of the Revenue Act of 1934, c. 277, 48 Stat. 680. The bill originating in the House changed Section 276 of the Revenue Act of 1932, c. 209, 47 Stat. 169, relating to false or no returns, and carried no period of limitations. The reason for the provisions was stated in a subcommittee report published as part of the House Hearings before the Committee on Ways and Means, 73d Cong., 2d Sess., Revenue Revision of 1934, p. 139, as follows:

Section 276 provides for the assessment of the tax without regard to the statute of limitations in case of a failure to file a return or in case of a false or fraudulent return with intent to evade tax.

Your subcommittee is of the opinion that the limitation period on assessments should also not apply to certain cases where the taxpayer has understated his gross income on his return by a large amount, even though fraud with intent to

evade tax cannot be established. It is, therefore, recommended that the statute of limitations shall not apply where the taxpayer has failed to disclose in his return an amount of gross income in excess of 25 percent of the amount of the gross income stated in the return. The Government should not be penalized when a taxpayer is so negligent as to leave out items of such magnitude from his return.

The full Committee adopted this reasoning as part of its report, published in H. Rep. No. 704, 73d Cong., 2d Sess., p. 35 (1939-1 Cum. Bull. (Part 2) 554, 580), as follows:

Section 276(a). No return or false return: The present law permits the Government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return. The change in this section continues this policy, but enlarges the scope of this provision to include cases wherein the taxpayer understates gross income on his return by an amount which is in excess of 25 percent of the gross income stated in the return. It is not believed that taxpayers who are so negligent as to leave out of their returns items of such magnitude should be accorded the privilege of pleading the bar of the statute.

The Finance Committee of the Senate incorporated the modification in the same language into Section 275 except that it provided for a five-year period of limitations. It was this provision that was finally enacted into law. In its report (S. Rep. No. 558, 73d Cong., 2d Sess., pp. 43-44 (1939-1 Cum. Bull. (Part 2) 586, 619)) the Committee said:

The present law permits the Government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return. The House bill continues this policy, but enlarges the scope of this provision to include cases wherein the taxpayer understates gross income on his return by an amount which is in excess of 25 percent of the gross income stated in the return. Your committee is in general accord with the policy expressed in this section of the House bill. However, it believed that in the case of a taxpayer who makes an *honest mistake*, it would be unfair to keep the statute open indefinitely. *For instance, a case might arise where a taxpayer failed to report a dividend because he was erroneously advised by the officers of the corporation that it was paid out of capital or he might report as income for one year an item of income which properly belonged in another year. Accordingly, your committee has provided for a 5-year statute in such cases. (Italics supplied.)*

From the foregoing it appears that in the preliminary stages the discussion was directed primarily to negligent omissions and *no statute of limitations* at all. As modified by the Senate and finally enacted the section was intended to cover non-negligent omissions but instead of no limitation period to provide the five-year period.

It is clear that the intent was to fix a period of limitations longer than the three-year one where there was a 25 per cent omission regardless of the case and good faith of the taxpayer and no matter how honest his mistake. In fact, the illustration

given in the Senate Committee report, italicized above, of the sort of omission covered by the statute, the honest but mistaken belief that an amount received was not income, is strikingly similar to what occurred in the present case.

As this Court pointed out in *Slaff v. Commissioner*, 220 F. 2d 65, 67, Congress in the Internal Revenue Code of 1954 has solved this problem for the future in Section 6501(e), reading in part as follows:

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

* * * *

(e) *Omission From Gross Income*.—Except as otherwise provided in subsection (c)—

(1) *Income taxes*.—In the case of any tax imposed by subtitle A—

(A) *General rule*.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—

(i) In the case of a trade or business, the term “gross income” means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown

on the return) prior to diminution by the cost of such sales or services; and

(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6501.)

The Tax Court pointed out that the legislative history states that this was a change from existing law. (R. 41.) Taxpayers disagree. (Br. 18-20.)

The Committee Reports, however, are explicit, stating in identical language (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A 414 (3 U.S.C. Cong. & Adm. News (1954) 4017); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 584 (3 U.S.C. Cong. & Adm. News (1954) 4621)) that—

Several changes from existing law have been made in subsection (e) of this section. In paragraph (1), which relates to income tax, the existing 5-year rule in the case of an omission of 25 percent of gross income has been extended to 6 years. The term gross income as used in this paragraph has been redefined to mean the total receipts from the sale of goods or services prior to diminution by the cost of such sales or

services. A *further change from existing law* is the provision which states that any amount as to which adequate information is given on the return will not be taken into account in determining whether there has been an omission of 25 percent. (*Italics supplied.*)

Furthermore, the rule set out in the 1954 Code goes beyond the decisions discussed above in accepting a disclosure "in the return, or in a statement attached to the return."⁵ The Tax Court recognizes that under the 1954 Code taxpayers' position would be correct. (R. 41.) That Code, however, did not re-enact existing law; it changed the law.

II

The Prior Decision of This Court Is Distinguishable, But If It Is Not the Tax Court Was Not Bound To Follow It

Taxpayers argue that *Slaff v. Commissioner, supra*, is a clear holding of this Court in support of its position (Br. 25) and that it was error for the Tax Court to refuse to follow it. The Tax Court, however, believed that the *Slaff* case was distinguishable. (R. 42-43.) In Point I, above, we have set out our reasons for urging that the *Slaff* case is not controlling here. In any event, we submit that its applicability is not clear, both for the reasons given by the Tax Court (R. 42-43), and also because of the *O'Bryan* decision.

⁵ Of course there remains the problem in each case of determining whether the disclosure is "adequate."

If, however, this Court should conclude that the position of this Circuit was clearly set out in the *Slaff* opinion and is in favor of the taxpayers, and should find it necessary to consider the second issue, we submit that the Tax Court was correct for the reasons as set out in its opinion (R. 43-49), as written by Chief Judge Murdock and reviewed by the entire court.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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No. 15532

United States
Court of Appeals
for the Ninth Circuit

ARTHUR L. LAWRENCE AND ALMA P. LAW-
RENCE,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED
Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-17-57

JUN 17 1957

PAUL P. O'BRIEN, CLERK

No. 15532

United States
Court of Appeals
for the Ninth Circuit

ARTHUR L. LAWRENCE AND ALMA P. LAW-
RENCE,

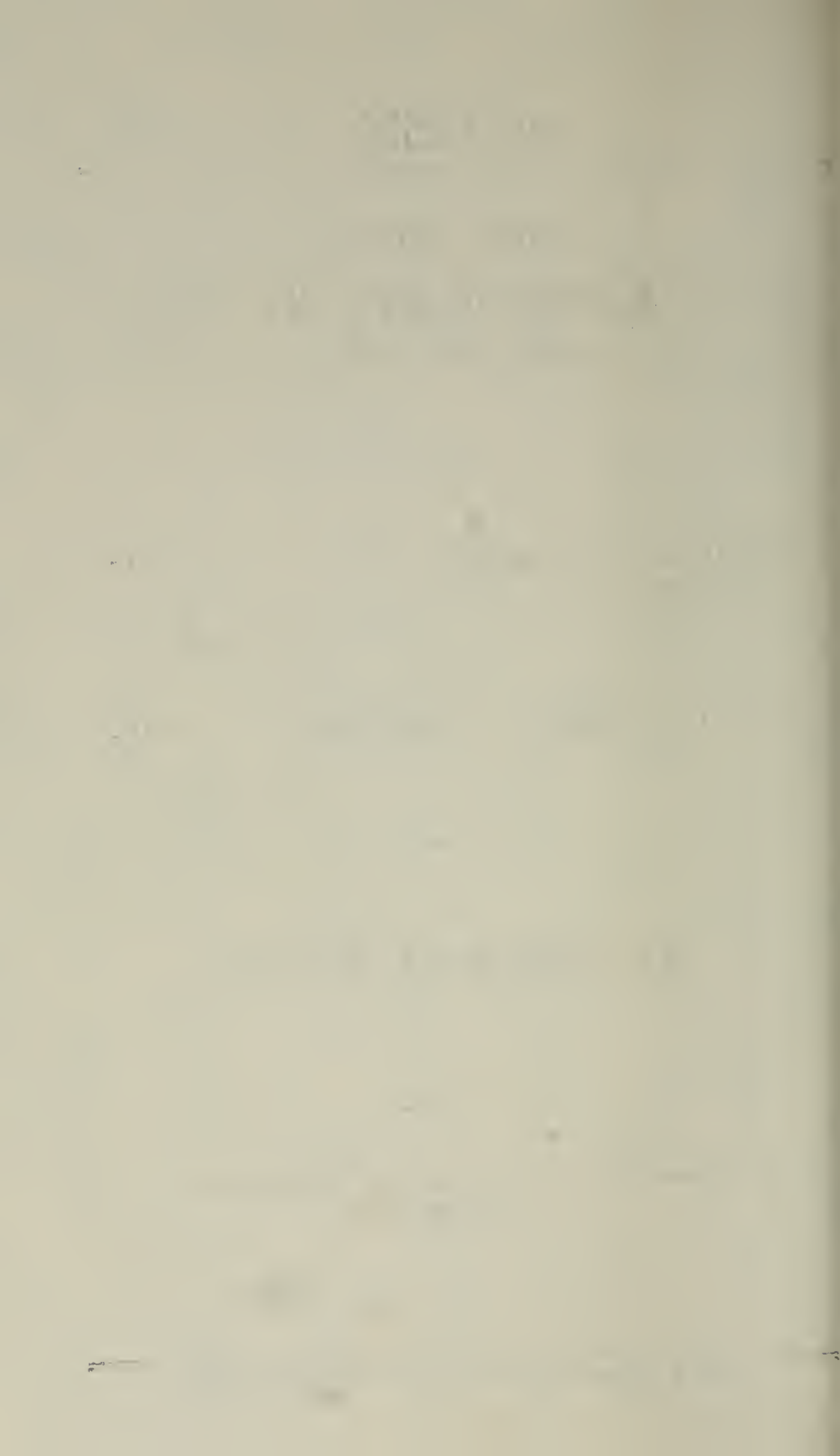
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 53929

ARTHUR L. LAWRENCE and ALMA P. LAW-
RENCE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (District Director of Internal Revenue, Seattle 4, Washington, A:R-VEZ:90D:vaw), dated May 10, 1954, and, as a basis for these proceedings allege as follows:

I.

The petitioners reside at 1605 Fremont Street, Las Vegas, Nevada. The return for the period here involved was filed with the Collector of Internal Revenue, Los Angeles, California.

II.

The notice of deficiency, a copy of which is attached hereto and made a part of this petition by reference, is dated May 10, 1954. (Exhibit A.)

III.

The taxes in controversy are income taxes for the calendar year 1948 in the amount of \$2,931.14.

IV.

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. The Commissioner erred in increasing petitioners' taxable income by adjusting the amount reported as capital gain, upon the complete liquidation of Midway Peerless Oil Company, including therein as part of the distribution of assets received an amount depicted as the ascertainable fair market value of the company's leasehold.

2. The Commissioner erred in increasing petitioners' taxable income by including as part of the distribution from Midway Peerless Oil Company the value of crude oil on hand and materials and supplies.

3. The Commissioner erred in asserting deficiency for the year 1948, closed by the running of the statute of limitations.

V.

The facts upon which petitioners rely are as follows:

1. The petitioner, Arthur L. Lawrence, acquired on April 7, 1942, 2,111 shares of stock of Midway Peerless Oil Company from the Estate of Lucille Manley.

2. Petitioner's stock holdings represented 4.342094% of the outstanding stock of Midway Peerless Oil Company.

3. Prior to the adoption of the resolution to dissolve, Midway Peerless Oil Company had entered into an agreement with M. H. Whittier Company, a partnership, whereby the latter was to continue the operation of these leasehold properties.

4. At a stockholders' meeting on or about December 3, 1948, it was resolved to dissolve Midway Peerless Oil Company as of the close of business December 15, 1948, by surrender to the corporation of all stock outstanding.

5. Petitioner, Arthur L. Lawrence, elected to accept Option A, of the corporate plan of distribution, whereby he received, pro rata to his stock holdings, the following assets:

- a. An assignment of participating royalty.
- b. An undivided interest in leasehold equipment.
- c. Cash, the pro rata share by which the total net value of all the assets of the corporation exceeded the value of the leases and leasehold equipment.

6. The terms set forth in said assignment of participating royalty give unto petitioner, Arthur L. Lawrence, the right to receive proceeds upon the sale of specified deposits contingent, however, upon the fact that production and proceeds of such deposits on sale are in excess of expenses incurred in production thereof by the operator, M. H. Whittier Company.

7. The present operators, M. H. Whittier Com-

pany, have the right to terminate said lease at their discretion.

8. Petitioner can in no way be authorized or in any manner allowed to participate in the management and control of the properties.

9. Payments, if any, to be received under this agreement are predicated upon the successful operation of the property by M. H. Whittier Company.

10. The assignment of participating royalty agreement is thus only a promise unto petitioner, Arthur L. Lawrence, by the corporation that he may receive future money payments wholly contingent upon facts and circumstances beyond the control of petitioner, and which are not possible to foretell with anything like fair certainty.

11. Petitioners have reported all receipts from M. H. Whittier Company under the participating royalty agreement when received.

12. Respondent has determined that petitioners' capital gain should be increased \$20,193.36, which he contends represents the fair market value of petitioners' distributive share of the corporate assets of Midway Peerless Oil Company. The purported values determined by respondent are as follows:

| | |
|-----------------------------|-------------|
| Oil reserves—Oil lease..... | \$20,104.18 |
| Crue oil on hand..... | 83.00 |
| Materials and supplies..... | 6.18 |

Total\$20,193.36

13. Respondent, in determination of the fair market value of the assignment of participating royalty mentioned in 5(a) above, has used as a basis the appraisal value of the corporation oil lease.

14. Petitioners have no knowledge of any sales or negotiations for sale of said participating royalty agreements by any of the former shareholders and, therefore, deny that any such sales have occurred.

15. Respondent has assumed that the entire estimated oil reserves, covered by the oil lease, will be extracted, saved and sold and that there was a readily ascertainable market value where, in fact, no market existed.

16. Petitioners reported, on a statement, attached to Schedule D of their return, all pertinent facts and figures regarding said liquidating distribution of Midway Peerless Oil Company. Petitioners' return set forth clearly, without omission, all values received. Code section 275(c) applies only where taxpayer has failed to make a return of some taxable gain.

17. Section 275(e) of the Internal Revenue Code states as follows:

“(e) Distributions in Liquidation to Shareholders—If a taxpayer omits from gross income an amount properly includible therein under section 115(c) as an amount distributed in liquidation of a corporation, other than a foreign personal holding company, the tax may be assessed, or a proceeding in court for the col-

lection of such tax may be begun without assessment, at any time within four years after the return was filed.”

Wherefore, petitioners pray that the Court may hear the proceeding and:

1. Determine that the Commissioner erred in increasing petitioners' taxable income through his determination of fair market value of the assignment of participating royalty distributed.

2. Determine that Commissioner erred in increasing petitioners' income through inclusion of the value of crude oil on hand and materials and supplies.

3. Determine that the Commissioner erred in asserting deficiencies for the year 1948, closed by the running of the statute of limitations under Section 275(e) of the Internal Revenue Code.

4. Grant such other and further relief as the Court may deem proper.

/s/ E. P. JARVIS,

Certified Public Accountant,
Counsel for Petitioners.

Duly verified.

EXHIBIT A

Form 1230

U. S. Treasury Department
Office of the District Director of Internal Revenue
905 Second Avenue Building
Seattle 4, Washington

Air Mail

May 10, 1954.

Internal Revenue Service
In replying refer to A:R
VEZ:90D:jaw

Mr. Arthur L. Lawrence and Mrs. Alma P. Lawrence,
Husband and Wife,
1605 Fremont Street,
Las Vegas, Nevada.

Dear Mr. & Mrs. Lawrence:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1948, discloses a deficiency or deficiencies of \$2,931.14, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the

deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturday, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, 905 Second Avenue Building, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner;

By /s/ WILLIAM E. FRANK,
District Director of Internal
Revenue.

Enclosures:

Statement

Form 1276

Agreement Form

A:R
VEZ:90D:jaw

Statement

Mr. Arthur L. Lawrence and Mrs. Alma P. Lawrence
Husband and Wife
Formerly Los Angeles, California
Now 1605 Fremont Street
Las Vegas, Nevada

Tax Liability for the Taxable Year Ended December 31, 1948

| | |
|------------------|------------|
| | Deficiency |
| Income tax | \$2,931.14 |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 3, 1954.

Adjustments to Net Income

| | |
|---|-------------|
| Net income as disclosed by return, Form 1040..... | \$12,984.21 |
| Unallowable deductions and additional income: | |
| (a) Capital gain | 10,096.68 |
| Net income adjusted | \$23,080.89 |

Explanation of Adjustments

(a) On your return you reported a long-term capital gain of \$8,639.81, taken into account at 50% or \$4,319.91, upon the distribution of assets in liquidation made by Midway Peerless Oil Company on December 15, 1948. It has been determined that the fair market value of assets received by you as a result of the distribution was as follows:

| | |
|-----------------------------|-------------|
| Oil lease | \$20,104.18 |
| Leasehold equipment | 1,507.27 |
| Employee cottages | 146.33 |
| Crude oil on hand..... | 83.00 |
| Materials and supplies..... | 6.18 |
| Cash and other assets..... | 8,886.11 |
| Total | \$30,733.07 |

Your gain is therefore recomputed as follows:

| | |
|---|-------------|
| Fair market value of assets received..... | \$30,733.07 |
| Basis of stock acquired 4-7-42..... | 1,899.90 |
| <hr/> | |
| Recognized gain | \$28,833.17 |
| Taken into account at 50%..... | 14,416.59 |
| Reported on return..... | 4,319.91 |
| <hr/> | |
| Increase in capital gain..... | \$10,096.68 |

Your reported net income is increased accordingly.

Computation of Tax

| | |
|---|-------------|
| Net income adjusted | \$23,080.89 |
| Less: Exemptions (2 x \$600)..... | 1,200.00 |
| <hr/> | |
| Income subject to tentative tax..... | \$21,880.89 |
| One-half of such income for joint return..... | \$10,940.45 |
| Tentative tax | 2,997.38 |
| Tax reduction: 17% of \$ 400.00 \$ 68.00..... | |
| 12% of 2,597.38 311.69..... | 379.69 |
| <hr/> | |
| Balance | \$ 2,617.69 |
| Correct income tax liability for joint return (2 x \$2,617.69) | 5,235.38 |
| Income tax liability disclosed by return, account #9117502 | 2,304.24 |
| <hr/> | |
| Deficiency in income tax | \$ 2,931.14 |

Received and filed July 22, 1954, T.C.U.S.

Served July 23, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to

the petition filed herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of the petition.

II.

Admits the allegations contained in paragraph II of the petition.

III.

Admits the allegations contained in paragraph III of the petition.

IV.

1 to 3, inclusive. Denies that in determining the deficiency asserted in the statutory notice of deficiency herein the respondent committed any error, and specifically denies the allegations of error set forth in subparagraphs 1 to 3, inclusive, of paragraph IV of the petition.

V.

1. Denies the allegations contained in subparagraph 1 of paragraph V of the petition except it is admitted that the petitioner, Arthur L. Lawrence, acquired on April 7, 1942, 2,111 shares of stock of Midway Peerless Oil Company.

2. Admits the allegations contained in subparagraph 2 of paragraph V of the petition.

3. Denies the allegations contained in subparagraph 3 of paragraph V of the petition.

4. Admits the allegations contained in subparagraph 4 of paragraph V of the petition.

5 to 11, inclusive. Denies the allegations contained

in subparagraphs 5 to 11, inclusive, of paragraph V of the petition.

12. Admits the allegations contained in subparagraph 12 of paragraph V of the petition.

13 to 16, inclusive. Denies the allegations contained in subparagraphs 13 to 16, inclusive, of paragraph V of the petition.

17. Admits the allegations contained in subparagraph 17 of paragraph V of the petition.

VI.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

VII.

Further answering the petition respondent alleges as follows:

(a) That petitioners omitted from gross income reported in their 1948 income tax return an amount properly includable therein which is in excess of 25 per centum of the amount of gross income stated in said return; therefore, the income tax for 1948 may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within five years after the return was filed as provided by Section 275(c) of the Internal Revenue Code.

(b) The petitioners' 1948 income tax return was filed on May 31, 1949, and the notice of deficiency from which this appeal is taken was mailed to the

petitioners on May 10, 1954, which date was within five years from the filing of the return.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of deficiency be approved.

/s/ DANIEL A. TAYLOR, W.H.P.
Chief Counsel, Internal
Revenue Service.

Of Counsel:

MELVIN L. SEARS,
Regional Counsel;

JOHN O. DURKAN,
Special Attorney, Internal
Revenue Service.

Filed September 2, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

REPLY

The above-named petitioners, for reply to the allegations affirmatively set forth by the respondent in his answer, admit and deny as follows:

VII.

(a) Denies the allegations contained in subparagraph (a) of paragraph VII of the answer.

(b) Petitioners admit that they filed a United States income tax return for the calendar year 1948 during the month of May, 1949. Petitioners admit

that respondent did on May 10, 1954, mail to petitioners herein the notice of deficiency for the taxable year 1948, but petitioners deny the remaining allegations of subparagraph (b) of paragraph VII of the answer.

(c) Deny all of the material allegations of respondent's answer not hereinbefore specifically admitted.

Wherefore, it is prayed that the affirmative relief requested by the respondent in his answer be denied, and that relief be granted as sought in the petition.

/s/ E. P. JARVIS,

Certified Public Accountant,
Counsel for Petitioners.

Received and filed October 11, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

Petitioners and respondent, by their respective counsel, stipulate that the merits of this proceeding may be decided on the basis of the following facts:

1. The petitioners reside at 1605 Fremont Street, Las Vegas, Nevada. They filed a joint United States income tax return for the calendar year 1948 with the Collector of Internal Revenue, Los Angeles, California, on May 31, 1949. A copy of said return, together with extensions of time for filing same, is attached hereto as Exhibit A-1.

2. On May 10, 1954, the Commissioner of Internal Revenue mailed to the petitioners a notice of deficiency in income tax in the amount of \$2,931.14 for the calendar year 1948. A copy of said notice, together with the statement which is referred to therein, is attached hereto as Exhibit B-2. The determination as contained in Exhibit B-2 is, in all respects, correct.

3. Petitioner, Arthur L. Lawrence, acquired 2,111 shares of stock of the Midway Peerless Oil Company on April 7, 1942. This amounted to 4.342094% of the outstanding stock. At a stockholders' meeting, on or about December 3, 1948, it was resolved to dissolve Midway Peerless Oil Company as of the close of business December 15, 1948, by surrender to the corporation of all stock outstanding. The amount of long-term capital gain derived by Arthur L. Lawrence upon the distribution in complete liquidation made by Midway Peerless Oil Company on December 15, 1948, is set forth on page one of the "Statement" in Exhibit B-2.

4. The only issue to be decided by the Court is that of the applicability of the statute of limitations, as pleaded in the petition and answer.

/s/ BROCKMAN ADAMS,
Counsel for Petitioners.

/s/ JOHN POTTS BARNES,

W.H.P.
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

U. S. INDIVIDUAL INCOME TAX RETURN

1948

For calendar year 1948 or fiscal year beginning 1948, and ending 1948

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than \$5,000, consisting wholly of wages shown on Form W-2, or of such wages and not more than \$100 of other wages, dividends, and interest.

Name Arthur L. Lawrence and Alma P. Lawrence
(PLEASE PRINT If this is a joint return of husband and wife, use first names of both)
HOME ADDRESS 58184 Warming Way
(PLEASE PRINT Street and number or rural route)
Los Angeles 42 California
(City, town, or post office) (Postal zone number) (State)
Occupation Inspector Social Security No. 706-03-4353
Housewife 537-10-3934

Do not write in these spaces
File Code
Serial No. 9117502
(Cashier's Stamp)
MAY 31 1949
COLL. INT. REV.
LOS ANGELES, CAL.
No. 10

1. List your own name, if married with wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives (as defined in instructions) with 1948 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)

Check to show whether you (or your wife) were at the end of your taxable year—

DEAD OR OVER

BLIND

On lines a and b below—
Write 1 if neither 65 nor blind,
Write 2 if either 65 or blind,
Write 3 if both 65 and blind

Your name Arthur L. Lawrence
Wife's (or husband's name) Alma P. Lawrence
Name of Other Dependent Relative

Yes ☐ No ☒ Yes ☐ No ☒
Yes ☐ No ☒ Yes ☐ No ☒
Relationship

a. Number of exemptions for you 2
b. Number of exemptions for other dependents 0
c. Number of different tax years—If different from 1948



Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) 2

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1948, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of Armed Forces and persons obtaining traveling or reimbursed expenses, see instructions.

Employer's Name

Where Employed (City and State)

Amount of Income Tax Withheld

Total Wages

King County Clerk's Office Seattle, Washington \$ 183.00 \$ 2,188.71

Enter totals: \$ 183.00 \$ 2,188.71

3. Enter here the total amount of your dividends
4. Enter here the total amount of your interest including interest from Government obligations unless wholly exempt from taxation
5. If you received any other income, give details on page 2 and enter the total here
6. Add income shown in items 2, 3, 4, and 5, and enter the total here

IF YOUR INCOME WAS LESS THAN \$5,000 You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, losses, casualty losses, medical expenses, and miscellaneous expenses. If you spend less than 10 percent of these amounts on more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.
IF YOUR INCOME WAS \$5,000 OR MORE. Disregard the tax table and compute your tax on page 3. You may either take a standard deduction or itemize your deductions, whichever is to your advantage.
HUSBAND AND WIFE. To obtain benefits of split-income provisions, husband and wife must file a joint return. If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

7. Enter your tax from table on page 4, or from line 18, page 3 \$ 2,304.24

8. How much have you paid on your 1948 income tax?
(A) Total tax in item 2, above (attach Original Forms W-2) \$ 183.00
(B) By payments on 1948 Declaration of Estimated Tax \$ 5,861.00

Enter total here → \$ 6,044.00

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here \$ 0.00

This balance of tax due must be paid in full with return.

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here \$ 2,739.76

Check (✓) whether you want this overpayment refunded to you ☒ or Credited on your 1949 estimated tax ☐

Enter total here 2,739.76

If you filed a return for a prior year, what was the latest year? 1947

To which Collector's office was it sent? Tacoma, Washington

To which Collector's office did you pay (Tacoma, Washington) amount claimed in item 8 (B), above Los Angeles, Calif.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

M. J. Thompson 5/16/49 (Date)

JARVIS & MOORE CPAs (Name of firm or employer, if any)

(Signature of preparer) Arthur L. Lawrence 5/18/49 (Date)

(Signature of taxpayer's wife or husband, if any) Alma P. Lawrence 5/18/49

To ensure early handling of split-income returns, file by May 31, 1949

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Page 1

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

| | | | |
|---|----|---|----|
| 1. Amount received (total amount you paid in) | \$ | 4. Total amount received this year | \$ |
| 2. Amount received tax-free in prior years | | 5. Excess, if any, of line 4 over line 3 | |
| 3. Remainder of cost (line 1 less line 2) | \$ | 6. Enter line 5, or 3 percent of line 1, whichever is greater (but do not enter more than line 4) | \$ |

Schedule B.—INCOME FROM RENTS AND ROYALTIES

| 1. Real and location of property | 2. Amount of rent or royalty | 3. Depreciation or depletion (explain on Schedule F) | 4. Repairs (explain on Schedule F) | 5. Other expenses (explain on Schedule F) |
|--|------------------------------|--|------------------------------------|---|
| 1. Shell Oil Co., Houston, Texas | \$ 311.52 | \$ 85.67 | - | \$ 4.27 |
| 2. Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5) | \$ 311.52 | \$ 85.67 | - | \$ 4.27 |

221 58

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Partners should obtain Form 1065)

| | |
|---|--|
| (1) Nature of business | (2) Business name |
| Business address | |
| Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession. | |
| Total receipts | \$ |
| COST OF GOODS SOLD | OTHER BUSINESS DEDUCTIONS |
| 1. Explain where inventories are an income-determining factor. Use the letters "C" or "M" in lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower in line 8. | 11. Salaries and wages (not on line 4) |
| 2. Inventory at beginning of year | 12. Interest on business indebtedness |
| 3. Merchandise bought for sale | 13. Taxes on business and business property |
| 4. Labor | 14. Losses (explain on Schedule F) |
| 5. Material and supplies | 15. Bad debts arising from sale of services |
| 6. Other costs | 16. Depreciation, depletion, and depletion (explain on Schedule F) |
| 7. Explain in Schedule G | 17. Repairs and other expenses (explain on Schedule F) |
| 8. Total of lines 2 to 6 | 18. Amortization of business facilities (explain on Schedule F) |
| 9. Less inventory at end of year | 19. Selling expenses (explain on Schedule F) |
| 10. Net cost of goods sold (line 7 less line 8) | 20. Total of lines 11 to 19 |
| 11. Gross profit (line 1 less line 9) | 21. No profit or loss (check box) |

Schedule D.—GAINS AND LOSSES FROM SALES OF EXCHANGE OF CAPITAL ASSETS, ETC.

| | |
|---|-----------|
| Net gain (or loss) from sale or exchange of capital assets (if more than one, list each separately) | \$ 491.78 |
|---|-----------|

Net gain (or loss) from sale or exchange of property other than capital assets (Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES, AND OTHER SOURCES

| | | |
|---|---------------------------|-------------|
| Name and address of partnership, estate, etc. | Manley & McInnis | \$ 2,751.21 |
| Name and address of estate, etc. | San Francisco, California | |
| Other sources (state nature) | | |
| Total | | \$ 2,751.21 |

Total income from above sources (Enter as item 5, page 1)

\$ 7,464.56

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPLETION CLAIMED IN SCHEDULES B AND C

| 1. Kind of property (If oil, gas, etc., state nature of property) | 2. Date acquired | 3. Cost or other basis (if not stated, state how determined) | 4. Amount of depletion claimed | 5. Depreciation or depletion in prior years | 6. Recouping cost or other basis to be recovered | 7. Is claimed as cost of acquiring property (explain) | 8. If claimed, explain how the basis is being recovered | 9. Depreciation claimed this year |
|---|------------------|--|--------------------------------|---|--|---|---|-----------------------------------|
| 1. Royalty | 4-7-42 | Depletion under Sec. 114(b)(3) IRC | \$ 85.67 | | | | | |

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

| 1. Explanation | 2. Amount |
|---|-----------|
| 1. Oil interest tax-Jones County, Texas | \$ 4.27 |

Form W-2
U.S. Treasury Department
General Services Administration

WITHHOLDING STATEMENT—1947
Wages Paid and Income Tax Withheld

ORIGINAL
Do Not Lose This Statement

TO WHOM PAID (Print name, full address, and Soc. Sec. No.)

Mr. J. R. ...
600 - ...
Seattle - ...

TO EMPLOYEE:

You may use the form on the back of this original Form W-2 as your return under certain conditions. Before you use it, read the instructions on the back of the attached Employee's Copy.

DO NOT WRITE IN THIS SPACE—FOR COLLECTOR'S USE ONLY

TO EMPLOYEE: Change name and address if not correctly shown

| | |
|---|-------------------------------------|
| Total wages (before pay-roll deductions) paid in 1947 | Federal income tax withheld, if any |
| 2189.77 | 107.00 |
| \$ | \$ |

EMPLOYER BY WHOM PAID (Name, address, and U.S. Identification No.)

King County - ...
902 Court City ...
Seattle, Wash.

| | |
|-----------------------|----|
| Tax | \$ |
| Credits | \$ |
| Balance due or refund | \$ |
| Interest on refund | \$ |
| Total | \$ |

IT:479

Treasury Department
Internal Revenue Service
Los Angeles 12, California

May 19, 1949.

In reply refer to
IT:EXT:RMC
MI 8111—Ext. 371

Form 1040

Mr. & Mrs. Arthur L. Lawrence (Alma P.),
c/o Jarvis & Moore,
23rd Floor, Smith Tower,
Seattle 4, Washington.

Dear Mr. & Mrs. Lawrence:

Receipt is acknowledged of your recent request for extension of time within which to file your income tax return for the calendar year 1948.

It is not the policy of the Bureau to grant extensions of time for filing income tax returns except in cases where the circumstances clearly warrant such action.

You are, therefore, advised that the reasons stated in your request do not warrant granting a further extension, but you are allowed until 5-31-49 within which to file your return before it will be considered delinquent and subject to the penalties provided by law.

This Letter or Copy Thereof Should Be Attached
to Your Return, When Filed, as Evidence of the
Authorization Herein Granted.

Very truly yours,

HARRY C. WESTOVER,

Collector;

By /s/ C. J. HOGAN,

Chief, Income Tax Division.

RMC:js

IT:39

Treasury Department
Internal Revenue Service
Los Angeles 12, California

April 15, 1949.

In replying refer to

IT:EXT:RMC

MI 8111—Ext. 371

Form 1040

Mr. & Mrs. Arthur L. Lawrence (Alma P.),
c/o Jarvis & Moore,
23rd Floor, Smith Tower,
Seattle 4, Washington.

Dear Mr. & Mrs. Lawrence:

Receipt is acknowledged of your application of
recent date requesting for the reasons stated an ex-
tension of time within which to file your return of
income for the calendar year 1948.

A further extension of time to 5-15-49 is hereby granted within which the above-mentioned return may be filed. In all cases where an extension of time is granted, interest is collectible at the rate of one-half of one per cent a month upon the unpaid tax from the original due date to the date of payment.

A Copy of This Letter Must Be Attached to the Return When It Is Filed as Authority for the Extension of Time Herein Granted.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner;

By /s/ HARRY C. WESTOVER,
Collector.

RMC:Lw

IT:5

Treasury Department
Internal Revenue Service
Los Angeles 12, California

In reply refer to

IT:EXT:RMC

MI 8111—Ext. 371

Form 1040

March 10, 1949.

Mr. Arthur L. Lawrence,
c/o Jarvis & Moore,
23rd Floor, Smith Tower,
Seattle 4, Washington.

Dear Mr. Lawrence:

Receipt is acknowledged of your application of recent date requesting, for the reasons stated, an extension of time within which to file your return of income for the calendar year 1948.

An extension of time to 4-15-49 is hereby granted within which this return may be filed. In all cases where an extension of time is granted, interest is collectible at the rate of one-half of one per cent a month upon the unpaid tax from the original due date of the return to the date of payment.

An extension of time cannot be granted for the filing of an income tax return on Form 1040A; therefore, it will be necessary when filing to use Form 1040.

A Copy of This Letter Must Be Attached to the Return When It Is Filed as Authority for the Extension of Time Herein Granted.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner;

By /s/ HARRY C. WESTOVER,
Collector.

RMC:gfw

IT:5

Treasury Department
Internal Revenue Service
Los Angeles 12, California

March 10, 1949.

In reply refer to
IT:EXT:RMC
MI 8111—Ext. 371

Form 1040

Mrs. Alma P. Lawrence,
c/o Jarvis & Moore,
23rd Floor, Smith Tower,
Seattle 4, Washington.

Dear Mrs. Lawrence:

Receipt is acknowledged of your application of recent date requesting, for the reasons stated, an extension of time within which to file your return of income for the calendar year 1948.

An extension of time to 4-15-49 is hereby granted within which this return may be filed. In all cases where an extension of time is granted, interest is collectible at the rate of one-half of one per cent a month upon the unpaid tax from the original due date of the return to the date of payment.

An extension of time cannot be granted for the filing of an income tax return on Form 1040A;

therefore, it will be necessary when filing to use Form 1040.

A Copy of This Letter Must Be Attached to the Return When It Is Filed as Authority for the Extension of Time Herein Granted.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner;

By /s/ HARRY C. WESTOVER,
Collector.

RMC:gfw

Schedule D (File with Form 1040)

TREASURY DEPARTMENT

Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY

For Calendar Year 1948 or fiscal year beginning

1948, and ending

1949

NAME AND ADDRESS Arthur L. Lawrence and Alma P. Lawrence, 5618 1/2 Marmion Way, Los Angeles 42, California

(1) CAPITAL ASSETS

| 1 Kind of property (if necessary, attach statement of descriptive details; see instructions below) | 2 Date acquired Mo Day Year | 3 Date sold Mo Day Year | 4 Gross sales price (less cost or other basis) | 5 Depreciation allowed (or allowable) (see instructions or March 1, 1913 (attach schedule)) | 6 Cost or other basis (if not purchased, attach explanation) | 7 Expenses of sale and cost of improvements (attach schedule or March 1, 1913) |
|--|--------------------------------|----------------------------|--|---|--|--|
|--|--------------------------------|----------------------------|--|---|--|--|

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS

| | | | | | | |
|---|----------|--------|-------------|--------|-------------|----------|
| 200 shares Paramount Pict. Inc., common | 12/30/47 | 5/4/48 | \$ 4,500 00 | \$ - - | \$ 4,241 00 | \$ 50 91 |
| 1 Totals | | | \$ 4,500 00 | \$ - - | \$ 4,241 00 | \$ 50 91 |

2 Net short-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 1).

\$ 208 09

3 Enter your share of the net short-term gain or loss from partnerships and common trust funds

\$ 0

Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 2 and 3

\$ 208 09

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD MORE THAN 6 MONTHS

| | | | | | | |
|---|----------|----------|--------------|------|-------------|----------|
| 1 Sh. Pacific Gas & Electric Co. | 3/22/46 | 3/30/48 | \$ 1 13 | \$ - | \$ 1 16 | \$ 01 |
| 1 Sh. Curtiss Wright, common | 10/29/46 | 5/25/48 | 762 50 | - | 813 00 | 14 90 |
| 1 Sh. 20th Century Fox Film Corp., common | 4/7/42 | 5/4/48 | 216 25 | - | 91 82 | 7 21 |
| 1 Sh. Central Bureau Mining Co., Capital | 1/11/46 | 5/19/48 | 70 35 | - | 190 95 | 3 61 |
| 1 Sh. Midway Peerless Oil Co.—Common | 4/7/42 | 12/24/48 | 10,539 71 | (A) | 1,899 90 | 0 |
| 5 Totals | | | \$ 11,589 94 | \$ - | \$ 2,996 83 | \$ 25 73 |

6 Net long-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 5)

\$ 8,567 38

7 Enter the full amount of your share of the net long-term gain or loss from partnerships and common trust funds

\$ 0

8 Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 6 and 7

\$ 8,567 38

9 Enter 50 percent of line 8. This is the amount to be taken into account in summary below

\$ 4,283 69

10 Summary of Capital Gains (use only if gains exceed losses in lines 4 and 9):

(a) Net gain for 1948 (either the sum of gains or difference between gains and losses in lines 4 and 9)

\$ 4,491 78

(b) Capital loss carry-over, 1943-1947 inclusive

None

(c) If line (a) exceeds line (b), enter this excess here and on line 1, Schedule D, page 2, Form 1040

\$ 4,491 78

(d) If line (b) exceeds line (a), enter the excess here and use line (a) to determine allowable loss

\$ -

(e) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (d), (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses, or (3) \$1,000

\$ -

(f) Enter here the amount on line (e) plus any capital loss carry-over from 1943 which was not used against line (a) or in line (e)

\$ -

(g) Subtract line (f) from line (d) and enter the remainder here. This is your capital loss carry-over to 1949

\$ -

11 Summary of Capital Losses (use only if losses exceed gains in lines 4 and 9):

(a) Net loss for 1948 (either the sum of losses or difference between losses and gains in lines 4 and 9)

\$ -

(b) Capital loss carry-over, 1943-1947 inclusive

\$ -

(c) Total of lines (a) and (b)

\$ -

(d) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (c), (2) net income (adjusted gross income if tax table is used, computed without regard to capital gains or losses, or (3) \$1,000

\$ -

(e) Enter here the amount on line (d) plus the amount of any 1943 capital loss carry-over not used in line (d)

\$ -

(f) Subtract line (e) from line (c) and enter the remainder here. This is your capital loss carry-over to 1949

\$ -

(2) PROPERTY OTHER THAN CAPITAL ASSETS

| 1 Kind of property | 2 Date acquired | 3 Gross sales price (cost or other basis) | 4 Depreciation allowed (or allowable) (see instructions or March 1, 1913 (attach schedule)) | 5 Cost or other basis (if not purchased, attach explanation) | 6 Expenses of sale and cost of improvements (attach schedule or March 1, 1913) |
|--------------------|-----------------|---|---|--|--|
| | | \$ | \$ | \$ | \$ |
| | | | | | |
| | | | | | |
| | | | | | |
| 1 Totals | | \$ | \$ | \$ | \$ |

2 Total net gain or loss (columns 3 plus 4 minus the sum of columns 5 and 6). Enter on line 2, Schedule D, page 2, Form 1040

\$

See schedule attached

Schedule D—Note A

Arthur L. Lawrence and Alma P. Lawrence
5818¼ Marmion Way, Los Angeles 42, California
Form 1040—Individual Income Tax Return

Computation of Gain on Liquidation of Midway Peerless Oil Company

| Item | Description | Value of Assets Distributed- Estimated 12-15-48 (Basis for Form 1099L) | | Value of Assets Distributed- Revised Appraisal | |
|------|-------------------------------------|--|---|---|---|
| | | Total | Share of A. L. Lawrence (4.3421%) | Total | Share of A. L. Lawrence (4.3421%) |
| 1 | Lease | \$573,420.78 | | \$448,726.99 | \$19,484.15 |
| 2 | Leasehold equipment | 34,713.00 | 1,507.27 | 34,713.00 | 1,507.27 |
| 3 | Buildings—Employee cottages | —0— | —0— | 3,370.00 | 146.33 |
| 4 | Inventories: | | | | |
| | (a) Crude oil on hand 12/15/48..... | 1,911.40 | 83.00 | 1,911.40 | 83.00 |
| | (b) Materials & supplies..... | 142.39 | 6.18 | 142.39 | 6.18 |
| | | | | | |
| | | \$610,187.57 | \$26,494.92 | \$488,863.78 | \$21,226.93 |
| 5 | Cash & other assets..... | 204,650.38 | 8,886.11 | 204,650.38 | 8,886.11 |
| | | | | | |
| | Totals | \$814,837.95 | \$35,381.03 | \$693,514.16 | \$30,113.04 |

Item 1—Lease is not readily marketable and has no ascertainable market value. Based upon the decision *Agnes F. Smith, Plaintiff, v. Harry C. Westover, Defendant*, 48-2, U.S.T.C. par. 9351, affirmed by the United States Court of Appeals for the Ninth Circuit, 173 Fed., (2d) 91 based upon the decision of the Supreme Court of the United States in *Burnet v. Logan* (X-1 CB 345), future payments will be returned as capital gains if and when received.

Item 4—Part of lease, see item 1, above.

Computation of Value Received During 1948 by Arthur L. Lawrence

| | |
|--|-------------|
| Cash received (item 5, above)..... | \$8,886.11 |
| Leasehold equipment (item 2, above)..... | 1,507.27 |
| Buildings—Employee cottages (item 3, above)..... | 146.33 |
| <hr/> | |
| Total value received in 1948—Schedule D of Return..... | \$10,539.71 |
| Basis of stock—Schedule D of Return..... | 1,899.90 |
| <hr/> | |
| Realized Long-Term Gain—Calendar Year 1948..... | \$ 8,639.81 |
| <hr/> <hr/> | |

EXHIBIT B-2

Form 1230

U. S. Treasury Department
Office of the District Director of Internal Revenue
905 Second Avenue Building
Seattle 4, Washington

May 10, 1954.

“Air Mail”

Internal Revenue Service
In replying refer to A:R
VEZ:90D:jaw

Mr. Arthur L. Lawrence and Mrs. Alma P. Lawrence,
Husband and Wife,
1605 Fremont Street,
Las Vegas, Nevada.

Dear Mr. & Mrs. Lawrence:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1948, discloses a deficiency or deficiencies of \$2,931.14, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the

deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Audit Division, 905 Second Avenue Building, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner;

By /s/ WILLIAM E. FRANK,
District Director of Internal
Revenue.

Enclosures:

Statement

Form 1276

Agreement Form

A :R

VEZ:90D :jaw

Statement

Mr. Arthur L. Lawrence and Mrs. Alma P. Lawrence

Husband and Wife

Formerly Los Angeles, California

Now 1605 Fremont Street

Las Vegas, Nevada

Tax Liability for the Taxable Year Ended December 31, 1948

| | |
|------------------|------------|
| | Deficiency |
| Income tax | \$2,931.14 |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 3, 1954.

Adjustments to Net Income

| | |
|---|-------------|
| Net income as disclosed by return, Form 1040..... | \$12,984.21 |
|---|-------------|

Unallowable deductions and additional income:

| | |
|------------------------|-----------|
| (a) Capital gain | 10,096.68 |
|------------------------|-----------|

| | |
|---------------------------|-------------|
| Net income adjusted | \$23,080.89 |
|---------------------------|-------------|

Explanation of Adjustments

(a) On your return you reported a long-term capital gain of \$8,639.81, taken into account at 50% or \$4,319.91, upon the distribution of assets in liquidation made by Midway Peerless Oil Company on December 15, 1948. It has been determined that the fair market value of assets received by you as a result of the distribution was as follows:

| | |
|-----------------------------|-------------|
| Oil lease | \$20,104.18 |
| Leasehold equipment | 1,507.27 |
| Employee cottages | 146.33 |
| Crude oil on hand..... | 83.00 |
| Materials and supplies..... | 6.18 |
| Cash and other assets..... | 8,886.11 |
| Total | \$30,733.07 |

Your gain is therefore recomputed as follows:

| | |
|---|-------------|
| Fair market value of assets received..... | \$30,733.07 |
| Basis of stock acquired 4-7-42..... | 1,899.90 |
| <hr/> | |
| Recognized gain | 28,833.17 |
| Taken into account at 50%..... | 14,416.59 |
| Reported on return..... | 4,319.91 |
| <hr/> | |
| Increase in capital gain..... | \$10,096.68 |

Your reported net income is increased accordingly.

Computation of Tax

| | |
|--|-------------|
| Net income adjusted..... | \$23,080.89 |
| Less: Exemptions (2 x \$600)..... | 1,200.00 |
| <hr/> | |
| Income subject to tentative tax..... | \$21,880.89 |
| One-half of such income for joint return..... | \$10,940.45 |
| Tentative tax | 2,997.38 |
| Tax reduction: 17% of \$ 400.00 \$ 68.00..... | |
| 12% of 2,597.38 311.69..... | 379.69 |
| <hr/> | |
| Balance | \$ 2,617.69 |
| Correct income tax liability for joint return | |
| (2 x \$2,617.69) | 5,235.38 |
| Income tax liability disclosed by return, | |
| account #9117502 | 2,304.24 |
| <hr/> | |
| Deficiency in income tax | \$ 2,931.14 |

Lodged August 21, 1956.

Filed August 23, 1956, T.C.U.S.

Tax Court of the United States

[Title of Cause.]

Filed January 25, 1957.

Statute of Limitations—Section 275(c)—25 Per Cent Omission From Gross Income—Omission Explained in Return: The 5-year period of limitations provided by Section 275(e) applies where a taxpayer omitted from gross income shown on the return a capital gain, which omission represented more than 25 per cent of the gross income shown on the return. It is immaterial that the omission was explained on a separate sheet of paper attached to the return.

Statute of Limitations—Section 275(c)—Section 275(e): The 5-year period of Section 275(c) is applicable even though the omitted amount was a distribution in liquidation of a corporation and on that basis alone a 4-year period would have been allowed under Section 275(e).

Tax Court Policy—Consideration of Reversal by Court of Appeals: The Tax Court, having national jurisdiction rather than a jurisdiction limited to only a portion of the Nation, when reversed on an issue by a Court of Appeals, must reconsider the point in the light of the reversing opinion and then decide whether to adhere to its original views or accept the views of the reversing court.

BROCKMAN ADAMS, ESQ.,

For the Petitioners.

JOHN POTTS BARNES, ESQ.,

For the Respondent.

OPINION

Murdock, Judge:

The Commissioner determined a deficiency of \$2,931.14 in the income tax of the petitioners for 1948. The facts have been stipulated. The stipulation is adopted as the findings of fact.

The petitioners, husband and wife, filed a joint Federal income tax return for 1948 with the collector of internal revenue, Los Angeles, California, on May 31, 1949, an extension to that date for filing having been granted. The notice of deficiency was not mailed until May 10, 1954, after the 3-year period, and after the 4-year period but before the 5-year period for assessment and collection had expired. The only question for decision is whether Section 275(c) applies, giving the Commissioner five years from the filing of the return within which to assess and collect the deficiency now admitted to be due.

Section 275(c) is as follows:

(c) Omission From Gross Income: If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

The petitioners have admitted that the deficiency determined by the Commissioner is correct. The

Commissioner, in determining that deficiency, included in income over \$20,000 of capital gain which the petitioners had omitted from gross income on their return. It was not included in the computation of gross income on the return. Even the taxable one-half of that amount is substantially "in excess of 25 per centum of the amount of gross income stated in the return." The petitioners do not contend otherwise.

The petitioners contend that they disclosed the nature and amount of the now admitted additional income in a manner adequate to apprise the Commissioner in a statement made a part of the return. Arthur acquired a portion of the stock of Midway Peerless Oil Company in 1942 and that company was liquidated on December 15, 1948. The liquidation resulted in the capital gain now determined by the Commissioner and agreed to by the petitioners. The petitioners reported on their return a long-term capital gain of \$8,567.38, one item of the computation of which was as follows:

Kind of Property: 2,111 Sh. Midway Peerless
Oil Co.—Com.

Date Acquired: 4/7/42.

Dated Sold: 12/24/48.

Gross Sales Price: \$10,539.71.

Cost or Other Basis: (A) \$1,899.90.

(A) See schedule attached.

The following appeared as a separate page of the return:

Schedule D—Note A

Arthur L. Lawrence and Alma P. Lawrence
5818 $\frac{1}{4}$ Marmion Way, Los Angeles 42, California
Form 1040—Individual Income Tax Return
Computation of Gain on Liquidation of Midway Peerless Oil Company

| Item | Description | Value of Assets Distributed- Estimated 12-15-48 (Basis for Form 1099L) | | Value of Assets Distributed- Revised Appraisal | |
|------|-------------------------------------|--|---|---|---|
| | | Total | Share of A. L. Lawrence (4.3421%) | Total | Share of A. L. Lawrence (4.3421%) |
| 1 | Lease | \$573,420.78 | \$24,898.47 | \$448,726.99 | \$19,484.15 |
| 2 | Leasehold equipment | 34,713.00 | 1,507.27 | 34,713.00 | 1,507.27 |
| 3 | Buildings—Employee cottages | —0— | —0— | 3,370.00 | 146.33 |
| 4 | Inventories: | | | | |
| | (a) Crude oil on hand 12/15/48..... | 1,911.40 | 83.00 | 1,911.40 | 83.00 |
| | (b) Materials & supplies..... | 142.39 | 6.18 | 142.39 | 6.18 |
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| | Totals | \$814,837.95 | \$35,381.03 | \$693,514.16 | \$30,113.04 |

Item 1—Lease is not readily marketable and has no ascertainable market value. Based upon the decision *Agnes F. Smith, Plaintiff, v. Harry C. Westover, Defendant*, 48-2, U.S.T.C. par. 9351, affirmed by the United States Court of Appeals for the Ninth Circuit, 173 Fed., (2d) 91 based upon the decision of the Supreme Court of the United States in *Burnet v. Logan* (X-1 CB 345), future payments will be returned as capital gains if and when received.

Item 4—Part of lease, see item 1, above.

Computation of Value Received During 1948 by Arthur L. Lawrence

| | | |
|--|------------|-------------|
| Cash received (item 5, above)..... | \$8,886.11 | |
| Leasehold equipment (item 2, above)..... | 1,507.27 | |
| Buildings—Employee cottages (item 3, above)..... | 146.33 | |
| | | <hr/> |
| Total value received in 1948—Schedule D of Return..... | | \$10,539.71 |
| Basis of stock—Schedule D of Return..... | | 1,899.90 |
| | | <hr/> |
| Realized Long-Term Gain—Calendar Year 1948..... | | \$ 8,639.81 |
| | | <hr/> <hr/> |

It is obvious from the entire return that the taxpayers made a computation of their income and omitted "from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return." The quoted words are from Section 275(c) which first appeared in the Revenue Act of 1934. The House bill had eliminated the statute of limitations in such cases but the Senate insisted upon a 5-year period, saying:

* * * For instance, a case might arise where a taxpayer failed to report a dividend because he was erroneously advised by the officers of the corporation that it was paid out of capital or he might report as income for one year an item of income which properly belonged in another year. Accordingly, your committee has provided for a 5-year statute in such cases. * * *
[CB 1939-1, Part 2, P. 619.]

The Tax Court can only apply the statute as Congress enacted it, and it has consistently held under similar circumstances that the 5-year period of limitations on assessment and collection applies rather than any shorter period, regardless of how honest the mistake and regardless of the possibility that from somewhere in the return or papers attached to it the information was given to the Commissioner of the transaction giving rise to the omitted income. *Anna M. B. Foster*, 45 B.T.A. 126, *affd.* 131 F. 2d 405; *Emma B. Maloy*, 45 B.T.A. 1104; *Estate of C. P. Hale*, 1 T.C. 121; *American Liberty*

Oil Co., 1 T.C. 386; William L. E. O'Bryan, 1 T.C. 1137; Katharine C. Ketcham, 2 T.C. 159, *affd.* (C.A.-2) 142 F. 2d 996; Oleta A. Ewald, 2 T.C. 384, *affd.* 141 F. 2d 750; M. C. Parrish & Co., 3 T.C. 119, *affd.* 147 F. 2d 284; Leslie H. Green, 7 T.C. 263, 275; Peyton G. Nevitt, 20 T.C. 318; H. Leslie Leas, 23 T.C. 1058; Dean Babbitt, 23 T.C. 850; The Colony, Inc., 26 T.C. 30.

The position taken by the petitioners in this case has now been enacted into law by Section 6501(e) (1)(A)(ii) of the Internal Revenue Code of 1954, as follows:

In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.

This provision was not made retroactive and its legislative history states that it was a "change from existing law," thus supporting the view consistently taken by the Tax Court as to the previously existing law. H. Rept. No. 1337, 83d Cong. 2d Sess., p. A414; Sen. Rept. No. 1622, 83d Cong., 2d Sess., p. 584. The Court in *Slaff v. Commissioner*, 220 F. 2d 65, 67, recognized that this legislation changed existing law.

This Court has also held that an omission within the meaning of Section 275(c) could result from

the overstatement of cost or a similar item, even though there was no omission of an income item from the computation of income shown on the return. Estate of J. W. Gibbs, Sr., 21 T.C. 443. The present situation is not such an omission and the fact that the Tax Court has been reversed in several cases of that type and affirmed in one does not help the present taxpayer. Uptegrove Lumber Company v. Commissioner, 204 F. 2d 570; Deakman-Wells Company v. Commissioner, 213 F. 2d 894, reversing 20 T.C. 610; Goodenow v. Commission, 238 F. 2d 20, reversing 25 T.C. 1; Reis v. Commissioner, 142 F. 2d 900, affirming 1 T.C. 9 and a Tax Court Memorandum Opinion. The Court of Appeals for the Third Circuit, in the Uptegrove case, considered Section 275(c) ambiguous insofar as it applied to an omission resulting from the overstatement of cost, but it clearly differentiated that kind of an omission from one, such as is here present, where the taxpayer "leaves some item of gain out of his computation of gross income." It distinguished cases of the latter type "because the applicability of the language of the statute, 'omits from gross income,' to the given facts was so clear."

The only possible complication in the decision of the present case is whether it might be contrary to a fairly recent decision of the Court of Appeals for the Ninth Circuit, to which this case could go on appeal. The reference is to the Slaff case, *supra*. There Slaff entered only one item, salary, on each of his returns. No computation of any kind was

shown. After the one income item, reported in the place for income received, he wrote, "exempt under Section 116 I.R.C.; therefore, no taxable income." The Tax Court held that there was a complete omission of "gross taxable income" and Section 275(c) applied. The Court of Appeals reversed but stated, "We are in full accord with the rulings in" the Uptegrove and Deakman-Wells cases, *supra*, in which the opinions indicate agreement with the Tax Court in a case like the present one. See also Goode-now, *supra*. If the views of the Court of Appeals for the Ninth Circuit are the same as those of the Court of Appeals for the Third Circuit, there is no difficulty here, but if it does not distinguish this case from its Slaff case, then, even so, the Tax Court must respectfully adhere to its own views in this case.

One of the difficult problems which confronted the Tax Court soon after it was created in 1926 as the Board of Tax Appeals was what to do when an issue came before it again after a Court of Appeals had reversed its prior decision on that point. Clearly, it must thoroughly reconsider the problem in the light of the reasoning of the reversing appellate court and, if convinced thereby, the obvious procedure is to follow the higher court. But if still of the opinion that its original result was right,¹ a court of national jurisdiction to avoid confusion should follow its own honest beliefs until the Supreme Court

¹If the issue turned upon a rule of law peculiar to some state or states within that Circuit, the practice of the Tax Court has been to follow the rule as laid down for that Circuit.

decides the point.² The Tax Court early concluded that it should decide all cases as it thought right.

This was not too difficult if appeal in the later case would not lie to the reversing Circuit. Missouri Pacific Railroad Co., 22 B.T.A. 267, 287, which followed Western Maryland Railway Co., 12 B.T.A. 889, after that case had been reversed, 33 F. 2d 695 (C.A.-4). The difficulty increased when the Tax Court adhered to its own opinion when appeal would lie to the reversing Circuit. Southern Railway Company, 27 B.T.A. 673, 688, *affd.* on the bond discount issue 74 F. 2d 887 (C.A.-4); Estate of Edward P. Hughes, 7 T.C. 1348, 1350; Harold Holt, 23 T.C. 469, 473. The pressure increased in situations where more than one Court of Appeals differed with the Tax Court, but was relieved if one or more agreed with the Tax Court. Robert L. Smith, 6 T.C. 255, 257. Cf. Putnam v. Commissioner, U. S. . . . (12-3-56). The Court of Appeals for the Eighth Circuit in that case affirmed a Memorandum Opinion of the Tax Court, 224 F. 2d 947. The Supreme Court affirmed, after granting certiorari, because of alleged conflict with Pollak v. Commissioner (C.A.-3) 209 F. 2d 57, reversing 20 T.C. 376; Edwards v. Allen (C.A.-5), 216 F. 2d 794; Cudlip v. Commissioner (C.A.-6)

²The United States Customs Court and the Court of Claims are other national courts operating on the trial court level, but they do not have similar problems since the appeals in each case go to an appellate court which also has a nationwide jurisdiction.

220 F. 2d 565, reversing a Tax Court Memorandum Opinion. See also *Basalt Rock Co., Inc.*, 10 T.C. 600, reversed (C.A.-9), 180 F. 2d 281, cert. denied 339 U. S. 966 and *Salko Brothers Furniture Co. v. Commissioner*, 185 F. 2d 222 (C.A.-5) affirming a Tax Court Memorandum Opinion which had followed 10 T.C. 600, cert. denied, 340 U. S. 952. Several Courts of Appeals have affirmed the Tax Court on the point decided in the present case.

The Tax Court and its individual Judges have always had respect for the 11 Courts of Appeals, have had no desire to ignore or lightly regard any decisions of those Courts and have carefully considered all suggestions of those Courts. The Tax Court not infrequently has been persuaded by the reasoning of opinions of those Courts to change its views on various questions being litigated. Cf. *Estate of William E. Edmonds*, 16 T.C. 110; *Albert L. Rowan*, 22 T.C. 865; *James M. McDonald*, 23 T.C. 1091; *Mills, Incorporated*, 27 T.C. . . (1-8-57).

This change of position sometimes backfires. The Tax Court, in *Wm. J. Lemp Brewing Company*, 18 T.C. 586, abandoned its decision on an issue in the face of reversals and disagreements on the part of Courts of Appeals for the Second and Eighth Circuits and the District of Columbia. It followed its new position on that point in *De Soto Securities Company*, 25 T.C. 175, but was reversed by the Court of Appeals for the Seventh Circuit, 235 F. 2d 409. Again, the Tax Court, five Judges dissenting, in *Burrus Mills, Inc.*, 22 T.C. 881, after being

reversed on the point involved therein by the Courts of Appeals for the Second, Seventh, Third and Sixth Circuits, concluded that it would have to follow those Courts, but later, in a case coming from the Court of Claims, the Supreme Court of the United States decided the point as the Tax Court had originally decided it. *United States v. Anderson, Clayton & Co.*, 350 U.S. 55. The Tax Court is not indifferent to the fact that a Court of Appeals has taken exception to its failure to follow a decision of that Court. Cf. *Stacey Mfg. Co. v. Commissioner*, 237 F. 2d 605. It repeatedly indicates in its opinions that it takes such action reluctantly and only because, after thorough re-examination, it cannot agree with the particular holding involved.

The Tax Court has always believed that Congress intended it to decide all cases uniformly, regardless of where, in its nationwide jurisdiction, they may arise, and that it could not perform its assigned functions properly were it to decide one case one way and another differently merely because appeals in such cases might go to different Courts of Appeals. Congress, in the case of the Tax Court, "inverted the triangle" so that from a single national jurisdiction, the Tax Court, appeals would spread out among 11 Courts of Appeals, each for a different circuit or portion of the United States. Congress faced the problem in the beginning as to whether the Tax Court jurisdiction and approach was to be local or nationwide and made it nationwide. Congress expected the Tax Court to set pre-

edents for the uniform application of the tax laws, insofar as it would be able to do that. Hearings before Ways and Means Committee, Revenue Act 1926, pp. 10, 869, 878, 911, 926, 932; H. Rept. No. 1, 69th Cong. 1st Sess., pp. 17-19; Congressional Record, Vol. 67, pp. 1136-7, 3749.

The Tax Court feels that it is adequately supported in this belief not only by the creating legislation and legislative history but by other circumstances as well. The Tax Court never knows, when it decides a case, where any subsequent appeal from that decision may go, or whether there will be an appeal. It usually, but not always, knows where the return of a taxpayer was filed and, therefore, the circuit to which an appeal could go, but the law permits the parties in all cases to appeal by mutual agreement to any Court of Appeals. Section 7482 (b)(2), I.R.C. 1954. Furthermore, it frequently happens that a decision of the Tax Court is appealable to two or even more Courts of Appeals. A few examples will illustrate. A corporation, having stockholders scattered over the United States, makes a distribution to all. The Commissioner holds it taxable as a dividend from accumulated earnings. The stockholders join in a trial before the Tax Court which decides the issue as to all petitioning stockholders, contrary to a decision of Court of Appeals A, which reversed a prior Tax Court decision, but perhaps in line with an affirming decision of Court of Appeals B. Cf. Edwin L. Wiegand, 14 T.C. 136, reversed (C.A.-7), 189 F. 2d 167, *affd.* (C.A.-3) (6-26-53, unreported), later reversed (C.A.-3), 194

F. 2d 479. If it had rendered a separate different decision for those stockholders in Circuit A, what amount of accumulated earnings would remain for future distributions? Another situation was presented by the Richmond Hosiery Mills. That corporation filed its corporate returns for three years with the collector of internal revenue for the district of Georgia and for one intermediate year with the collector of internal revenue for the district of Tennessee. It received one notice of deficiency and filed a single petition in the Tax Court each covering all four years. The Tax Court decided the case for all four years in a Memorandum Opinion and entered but one decision in the proceeding. The taxpayer took appeals to the Circuit Courts of Appeals for both the Fifth Circuit and the Sixth Circuit, in the former as to three of the years and in the latter as to a single year. The Sixth Circuit, in *Richmond Hosiery Mills v. Commissioner*, 237 F. 2d 605, a companion case with *Stacey Mfg. Co.*, *supra*, followed its own prior decision in *Owensboro Wagon Company v. Commissioner*, 209 F. 2d 617, reversing 18 T.C. 1107, while the Fifth Circuit, which had not previously passed on this question, in *Richmond Hosiery Mills v. Commissioner*, 233 F. 2d 908, adopted the view of the Sixth Circuit as expressed in the *Owensboro* case. Or suppose partners live in different circuits. Are the decisions of the Tax Court as to them to vary accordingly? See *Choate v. Commissioner*, 324 U.S. 1, in which the appeal in the case of *Hogan* was taken to the Fifth Circuit which affirmed the Tax Court, *Hogan v.*

Commissioner, 141 F. 2d 92, and the appeal in the case of Choate was to the Tenth Circuit which reversed the Tax Court, *Choate v. Commissioner*, 141 F. 2d 641, which was then reversed by the Supreme Court, thus affirming the Tax Court. Many more similar examples could be given. There is also the sometimes difficult problem of knowing from prior decisions of the appellate court precisely what its attitude is in relation to the current question before the Tax Court, Cf. *Estate of Catherine Cox Blackburn*, 11 T.C. 623, modified 180 F. 2d 952, particularly where it has more than one decision outstanding and each may seem to have a bearing but they are not too easily reconciled. The *Slaff* case already discussed is another example.

The Commissioner of Internal Revenue, who has the duty of administering the taxing statutes of the United States throughout the nation, is required to apply these statutes uniformly, as he construes them. The Tax Court, being a tribunal with national jurisdiction over litigation involving the interpretation of Federal taxing statutes which may come to it from all parts of the country, has a similar obligation to apply with uniformity its interpretation of those statutes. That is the way it has always seen its statutory duty and, with all due respect to the Courts of Appeals, it cannot conscientiously change unless Congress or the Supreme Court so directs.

The taxpayers also argue that the Commissioner had only four years instead of five years within

which to send out the notice of deficiency on which he could then assess and collect the tax. Section 275(e) on which they rely provides for a four-year period of limitations "If the taxpayer omits from gross income an amount properly includible therein under Section 115(c) as an amount distributed in liquidation of a corporation, * * *." Congress thereby gave an extra year to the Commissioner over the general three-year period if the omission was of the kind described therein, but Congress gave the Commissioner two extra years if the omission was of the kind described in Section 275(c). The two subsections overlap to some extent but since the omission here is of the kind described in Section 275(c), it is immaterial whether or not it might also qualify for the lesser period allowed by Section 275(e). There is nothing in the statute or its legislative history to indicate that if a particular omission was of the kind which came within both of these sections the Commissioner would be limited to the shorter period. See *Estate of Arthur T. Marix*, 15 T.C. 819, 825. The statute of limitations is not a bar to the assessment and collection of the deficiency in the present proceeding.

Reviewed by the Court.

Decision will be entered for the respondent.

Served January 28, 1957.

Entered January 28, 1957.

The Tax Court of the United States
Washington

Docket No. 53,929

ARTHUR L. LAWRENCE and ALMA P. LAW-
RENCE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed January 25, 1957, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,931.14 for the year 1948.

[Seal] /s/ J. MURDOCK,
Judge.

Served January 31, 1957.

Entered January 31, 1957.

The United States Court of Appeals
for the Ninth Circuit

Docket No. 15,532

ARTHUR L. LAWRENCE and ALMA P. LAW-
RENCE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Come now the petitioners, by and through their attorney, Brockman Adams of Little, LeSourd, Palmer, Scott & Slemmons, 15th Floor, Hoge Building, Seattle, Washington, and petition the Court for review of the decision of the Tax Court of the United States entered on January 31, 1957, in the case in that court entitled "Arthur L. Lawrence and Alma P. Lawrence, Petitioners, vs. Commissioner of Internal Revenue," Docket No. 53,929, and states in support of this petition:

A. The controversy, review of which is hereby sought, is as to whether petitioner is subject to all or any part of a proposed deficiency in federal income taxes for the calendar year 1948 in the amount of \$2,931.14, together with accrued interest.

B. Petitioners hereby seek review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States

on January 31, 1957, determining that there was a deficiency for the year 1948 in the amount above stated.

C. The income tax return of petitioners for the year of which review is hereby sought was filed in the Collector's office in Los Angeles, California. The place where petitioners reside, and the place where the office of said Collector (now Director) of Internal Revenue at Los Angeles is located, is within the Circuit of the United States Court of Appeals for the Ninth Circuit, and said Court is the court having jurisdiction of a review of the decision of the Tax Court herein under the provisions of 26 U.S.C. Sec. 7482, Subdivision (b)(1). That venue is thereby established in the United States Court of Appeals for the Ninth Circuit.

D. That the decision of the Tax Court was entered herein January 31, 1957, and the time for filing a petition for review has not as yet expired.

Wherefore your petitioners pray that the review be had of the decision of the Tax Court rendered in the above-entitled matter, and that upon such review said decision be reversed.

Dated this 11th day of March, 1957.

Respectfully submitted,

/s/ BROCKMAN ADAMS,
For Petitioners.

Received and filed March 20, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

NOTICE OF APPEAL

To the Commissioner of Internal Revenue, and to Nelson P. Rose, Chief Counsel of the Internal Revenue Service; Melvin L. Sears, Regional Counsel; and John O. Durkin, Special Attorney, Bureau of Internal Revenue, His Attorneys:

You and Each of You Are Hereby Notified that Arthur L. Lawrence and Alma P. Lawrence are herewith filing their petition for review of a decision of the Tax Court of the United States entered in the above cause on January 31, 1957, and by the filing of said petition do appeal from said decision to the United States Court of Appeals for the Ninth Circuit.

Dated this 11th day of March, 1957.

/s/ BROCKMAN ADAMS,
Attorney for Petitioner.

Service of copy acknowledged.

Received and filed March 22, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

STATEMENT OF POINTS

Come now petitioners and set forth the following statement of points upon which they will rely on the appeal from the decision of the Tax Court of

the United States entered in this cause on January 31, 1957.

1. The Tax Court erred in that its findings of fact do not support the decision of the Court.

2. The Tax Court erred in deciding that on its Findings of Fact the proposed federal income tax deficiency against the petitioners for the year 1948 was not barred by the statute of limitations set forth in Internal Revenue Code, Section 275(a).

3. The Tax Court erred in deciding that on its Findings of Fact the proposed federal income tax deficiency against petitioners for the year 1948 was not barred by the statute of limitations set forth in Internal Revenue Code, Section 275(e).

4. The Tax Court erred in deciding that on its Findings of Fact the proposed federal income tax deficiency against petitioners for the year 1948 was not barred by the statute of limitations for the reason that the period of limitation was not extended by Internal Revenue Code, Section 275(c).

5. The Tax Court erred in failing to follow the previous decisions of the United States Court of Appeals for the Ninth Circuit where the Ninth Circuit held that the extension of the period of limitations by Section 275(c) does not apply where taxpayer makes a full disclosure of income on his return.

6. The Tax Court erred in failing to enter a decision that there was no deficiency in federal income taxes due from petitioners for the year 1948.

Dated this 11th day of March, 1957.

/s/ BROCKMAN ADAMS,
Attorney for Petitioners.

Service of copy acknowledged.

Received and filed March 20, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review," in the case before the Tax Court of the United States docketed at the above number and in which the taxpayers in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 9th day of April, 1957.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15,532. United States Court of Appeals for the Ninth Circuit. Arthur L. Lawrence and Alma P. Lawrence, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed April 22, 1957.

Docketed April 29, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

ARTHUR L. LAWRENCE and ALMA P. LAWRENCE
Petitioners-Appellants

VS.

COMMISSIONER OF INTERNAL REVENUE
Respondent-Appellee

ON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

REPLY BRIEF OF APPELLANTS

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS
BROCKMAN ADAMS
MAX D. CRITTENDEN

Attorneys for Appellants.

15th Floor, Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

SEP - 4 1957

PAUL P. GREEN, CLERK

United States Court of Appeals
For the Ninth Circuit

ARTHUR L. LAWRENCE and ALMA P. LAWRENCE
Petitioners-Appellants

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent-Appellee

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United States Court of Appeals

For the Ninth Circuit

ARTHUR L. LAWRENCE and ALMA P. LAW-
RENCE, *Petitioners-Appellants,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
 Respondent-Appellee.

} No. 15532

ON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

REPLY BRIEF OF APPELLANTS

The brief for the Government in this court is a further example of the respondent-commissioners' ever-increasing technical interpretation of the words "omit," "income," "gross income," and his attempt by means of a technical application of the method of reporting and computing taxable income to extend the statute of limitations to five years in as many cases as possible. Logically it would seem that Congress' original intention in providing a 5-year statute of limitations for "omission" was to give the Commissioner additional time to discover items which could not be ascertained from an examination of the face of the return. This position has obviously been abandoned by the Commissioner, since at no point does the respondent-commissioner argue that appellants' receipts were not clearly revealed or their method of handling and the taxpayers' legal position completely and fully set

forth. Appellants' opening brief did not discuss at length certain appellate decisions in that appellants did not know what technical defenses the respondent-commissioner would present to this court. Upon examination of respondent's brief it is submitted that every issue raised by respondent-commissioner has previously been decided against respondent in the appellate courts.

I.

There Has Been No Omission of Gross Income Within the Meaning of §275(c) Internal Revenue Code of 1939

The respondent in his brief (Resp. Br. p. 6) argues that the item of income here in question was not included in taxpayers' taxable income as reflected in item 6, page 1, of the return. The respondent then argues (Resp. Br. 7) that an exclusion from "reportable income" is the same as "omits from gross income." This precise point was raised by Commissioner in *Davis v. Hightower*, 230 F.(2d) 549 (5th Cir. 1956) This case involved whether or not a specific item of income was to be treated as a capital gain or ordinary income. The Commissioner urged that since the taxpayer had treated this income as a capital gain, the amounts excluded by the taxpayer did not appear in item 6 on page 1 of the return and did not appear on page 2 in the summary from separate Schedule D and therefore was an omission from gross income. The appellate court examined the income tax return and determined that there is no one place in the return to include a figure which might be called "gross income" and, therefore, the taxpayer, in entering the amounts

which he considered as capital gain on Schedule D, had reported his "gross income." The court then went on to point out the unfair and illogical interpretation which the Commissioner's construction of the statute would establish:

"[2] The only way in which the taxpayer here could satisfy the government's requirement that he state his 'gross income' in a way to permit a tax computation of the amount the government claims is due, would be for him to abandon his claim that he was entitled to capital gains treatment of the sales in question. No such penalty was intended by Congress in extending the statutory period to five years in case of substantial omission. It cannot be thought that if a taxpayer accurately fills in every blank space provided for his use in the income tax form, giving every 'gross' or maximum figure called for, and arrives at an incorrect computation of the tax only by reason of a difference between him and the Commissioner as to the legal construction to be applied to a disclosed transaction, the use of a smaller figure than that ultimately found to be correct in one stage of the computation amounts to an omission from 'gross income' of the difference between the correct and incorrect item."

This same position now being urged by Commissioner in the case at bar would effectively prevent the taxpayer from invoking the jurisdiction of the Tax Court, which was established to prevent oppression of the taxpayers by allowing them to litigate before paying when aggrieved by questionable application of the tax law. The position urged by respondent-commissioner would mean that taxpayers would be forced to

include all items in their computation of taxable income (whether excludable or not) and then sue for refund of such amounts or automatically place themselves in the position of establishing a five-year statute of limitations. There is no indication that Congress ever intended that taxpayers should be required to submit to a five-year statute of limitations on matters involving exclusions from taxable income in order to invoke the jurisdiction of the Tax Court, which Congress specifically created to allow taxpayers to litigate questionable theories of taxation first before being subjected to assessment.

Commissioner next argues that this case is distinguishable from *Slaff v. Commissioner*, 220 F.(2d) 65 (9th Cir. 1955) on the basis that taxpayers may have reported the items received but that they were not reported as Mr. Slaff did in a box entitled "income." If the argument of the respondent-commissioner is that the taxpayer must report the item as taxable income and include it in his final summarization of taxable income, then this is the same argument he makes in his brief (Resp. Br. pp. 6-7) which is completely answered by the reasoning set forth in *Davis v. Hightower*, *supra*. If the respondent-commissioner is arguing that there is a factual distinction between the *Slaff* and *Lawrence* returns because the *Lawrence* returns contain the reporting and computing of gross income on a separate schedule, then the respondent-commissioner is arguing a distinction on which said respondent has been previously overruled by the Third Circuit in *Deakman-Wells Co., Inc. v. Commissioner*, 213 F.(2d) 884 (3rd Cir. 1954).

Respondent-commissioner cites the case of *O'Bryan v. Commissioner*, 148 F.(2d) 456 (9th Cir. 1945). This was one of the early cases litigated by the commissioner when the commissioner was litigating those cases wherein there had not been a full disclosure and commissioner had a logical basis for arguing that completely omitted or misleading reporting of gross income should entitle the commissioner to a 5-year statute of limitations in which to discover such omissions. The reporting in *O'Bryan v. Commissioner, supra*, was misleading and the case was not decided on the basis of full disclosure, since the Tax Court in the *O'Bryan v. Commissioner*, 1 T.C. 1137, found that in this case there had been no full disclosure. The distinction between the *O'Bryan v. Commissioner, supra*, case and the cases of Mr. Lawrence and Mr. Slaff is that both Lawrence and Slaff reported their respective "income" in the proper manner on their returns and neither omitted anything.

It is true that the Third Circuit Decisions of *Uptegrove Lumber Co. v. Commissioner*, 204 F.(2d) 570 (3rd Cir. 1953) and *Deakman-Wells Co., Inc. v. Commissioner, supra*, involved overstatement of deductions from gross income which thereby resulted in the computation of "adjusted gross income" being incorrect, but certainly the Commissioner does not urge that there is a valid distinction between taking an improper deduction because of a faulty legal theory and taking an improper exclusion because of a faulty legal theory when both are clearly stated on the return.

The Sixth Circuit decisions of *Ewald v. Commis-*

sioner, 141 F.(2d) 750 (6th Cir. 1944), and *Reis v. Commissioner*, 142 F.(2d) 900 (6th Cir. 1944) are not applicable to the case at bar in that there was an admitted "omission" in *Ewald v. Commr., supra*, and the taxpayer was argueing whether the statute applied to intentional as well as negligent omissions. The distinction between *Ewald v. Comm., supra*, and the case at bar is well set forth in *Uptegrove Lumber Co. v. Commissioner*, 204 F.(2d) 570 (3rd Cir. 1953) in the following language:

"Beyond this, we have found no decision of a Court of Appeals which has considered this problem. The Commissioner suggests that his position is supported by such cases as *Ewald v. Commissioner*, 6 Cir., 1944, 141 F.(2d) 750; *Ketcham v. Commissioner*, 2 Cir., 1944, 142 F.(2d) 996, and *O'Bryan v. Commissioner*, 9 Cir., 1945, 148 F.(2d) 456. We do not agree. These cases all involved failures to enter certain items of gain in the gross income sections of returns. Each taxpayer relied upon the fact that somewhere else in his return, or in some statement attached to it, he had revealed the existence of the item in question though he did not report it as gain taxable to himself. On this basis it was arguable that these cases did not involve the mischief of effective concealment by non-disclosure which the extended limitation period of Section 275(c) was designed to offset. For taxpayers having revealed the omission when they filed their returns, there would be no reason of policy for allowing an extra two years for the Collector to act upon those omissions. But the courts could not reach these policy considerations because the applicability of the language of the statute, 'omits from gross income,' to the given facts was so clear.

There was no relevant ambiguity in the statute to warrant the consideration of its purpose in order to discover its meaning. Thus, the cited cases do not help us here."

Sixth Circuit decisions of *Carew v. Commissioner*, 215 F.(2d) 58 (6th Cir. 1954) and *Colony Inc. v. Commissioner*, 244 F.(2d) 75 (6th Cir. 1957) petition for cert. filed July 22, 1957, are not helpful in that *Carew v. Comm.* involved an admitted omission and *Colony Inc. v. Comm.* was affirmed on the basis of the earlier 6th Circuit decisions, without an analysis of the recent Circuit Court Decisions.

The Second Circuit decision of *Ketcham v. Commissioner*, 142 F.(2d) 996 (2nd Cir. 1944) again is a case involving a question of whether there had been a full disclosure or whether the taxpayer had misled the Commissioner.

II.

Legislative History

Appellants' argument (App. Br. pp. 14-18) on legislative history is based upon the meaning of the word "omit," not on negligence or intention of taxpayer. Respondent does not meet appellants' argument on the meaning of the word "omit."

III.

Effect of Section 6501(e)(1)(A) of Internal Revenue Code of 1954

The retroactive effect of remedial legislation upon matters which have been extensively litigated in the courts is very difficult to determine. Taxpayers submit that said legislation will have its true application to

situations occurring in the future, but wish to point out that the respondent-commissioner's argument that this was a change from existing law and therefore the existing law must have been in his favor (Resp. Br. 16-17) has been rejected by the Court of Appeals for the Fifth Circuit in *Davis v. Hightower*, 230 F.(2d) 549 (5th Cir. 1956). The court summarizes the effect of Section 6501 in the following language:

"To this legislative history is now added the amendment contained in the 1954 Internal Revenue Code, under the terms of which it is now clear that the inclusion of the statement made by appellee in his return here would be sufficient to prevent application of the five-year statute. In view of the confusion as to the meaning of the statute prior to the adoption of the 1954 Code, we think it plain that the new language was enacted to clarify the existing law."

IV.

Conclusion

Taxpayers submit that respondent-commissioner in his brief has not urged upon this court a single new argument that has not been previously decided against respondent in one or the other of the Courts of Appeal, and further that Commissioner has not shown a logical or equitable reason for applying the five-year statute of limitations in this case.

Respectfully submitted,

LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS

BROCKMAN ADAMS

MAX D. CRITTENDEN

Attorneys for Appellants.

